Supreme Court, U.S.
FILED
071054 FEB 14 2008
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

ROBERT M. GATES, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

HAJI BISMULLAH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Solicitor General
Counsel of Record
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
GREGORY G. GARRE
Deputy Solicitor General
JONATHAN F. COHN
Deputy Assistant Attorney General
NICOLE A. SAHARSKY
Assistant to the Solicitor General
DOUGLAS N. LETTER
ROBERT M. LOEB
AUGUST E. FLENTJE
CATHERINE Y. HANCOCK
JENNIFER PAISNER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The Department of Defense has held military hearings using Combatant Status Review Tribunals (CSRTs) to determine whether foreign nationals captured abroad by the United States during the war on terror and detained at the Guantanamo Bay Naval Base in Cuba are properly designated as enemy combatants. In preparation for each CSRT hearing, a military officer examined material from a variety of government agency files and presented a subset of that material to the CSRT. The CSRT considered that evidence, along with the detainee's evidence, in determining whether the detainee is an enemy combatant. A final decision of a CSRT may be reviewed exclusively in the United States Court of Appeals for the District of Columbia Circuit under the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, § 1005(e)(2), 119 Stat. 2739. The adequacy of the procedures established by the DTA is currently pending before this Court in *Boumediene* v. *Bush*, No. 06-1195 (argued Dec. 5, 2007), and *Al Odah* v. *United States*, No. 06-1196 (argued Dec. 5, 2007). The question presented in this case is:

Whether, in an action brought under the DTA, the record for judicial review of a CSRT determination consists of the material presented to and considered by the CSRT, or whether it extends to the much broader category of all reasonably available information in the possession of the United States government bearing on the issue of whether the detainee is an enemy combatant, regardless of whether the material was actually presented to or considered by the CSRT.

PARTIES TO THE PROCEEDING

The petitioners are Robert M. Gates, Secretary of Defense; Harry B. Harris, Admiral, United States Navy; and Wade F. Davis, Colonel, United States Army.

The respondents are Haji Bismullah, a/k/a Haji Bismillah, a/k/a Haji Besmella; Haji Mohammad Wali, acting as next friend of Haji Bismullah; Huzaifa Parhat; Abdusabour; Abdusemet; Hammad; Jalal Jalaldin; Khalid Ali; and Sabir Osman.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of Defense and the other federal petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-54a) is reported at 501 F.3d 178. The supplemental opinion of the court of appeals on petition for panel rehearing (App., *infra*, 55a-66a) is reported at 503 F.3d 137.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 2007, and was amended on October 23, 2007. A petition for rehearing was denied on February 1, 2008 (App., *infra*, 67a-102a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions are reprinted in the appendix to the petition (App., *infra*, 103a-112a).

STATEMENT

1. Following the 9/11 attacks, the President—with the backing of Congress, see Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224—ordered United States Armed Forces to subdue both the al Qaeda terrorist network and the Taliban regime harboring it in Afghanistan. Although our troops have removed the Taliban from power, armed combat with al Qaeda, the Taliban, and associated forces remains ongoing. In connection with those conflicts, the United States has seized many hostile persons and detained a small fraction of them as enemy combatants. Approximately 275 of these enemy combatants are being held at the United States Naval Base at Guantanamo Bay, Cuba. Each of them was captured abroad and is a foreign national.

2. With the exception of a handful of newly-arrived detainees, every Guantanamo Bay detainee has received a hearing before a military Combatant Status Review Tribunal (CSRT). CSRTs are designed "to determine, in a fact-based proceeding, whether the individuals detained * * * are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation." App., *infra*, 121a. An "enemy combatant" is defined as "an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." *Id.* at 124a.

During the CSRT proceedings, each detainee received procedural protections modeled on—and, indeed, exceeding—the procedures used by the Army for determining the status of detainees under the Geneva Convention. Compare U.S. Dep't of the Army et al., *Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Nov. 1, 1997) <http://usapa.army/mil/ pdfiles/r190_8.pdf> (implementing Article 5 of the Third Geneva Convention), with App., *infra*, 113a-168a (CSRT procedures); see also U.S. Br. at 48-53, *Boumediene* v. *Bush* and *Al Odah* v. *United States*, Nos. 06-1195 & 06-1196 (argued Dec. 5, 2007).

CSRT procedures provided for each detainee to receive notice of the unclassified factual basis for his designation as an enemy combatant and to be afforded the opportunity to testify, to call relevant and reasonably available witnesses, and to present relevant and reasonably available evidence. App., *infra*, 121a. CSRT procedures also ensured that each detainee was assigned a military officer to serve as his "personal representative" to assist him by "explain[ing] the nature of the CSRT process," "explain[ing] his opportunity to personally appear before the Tribunal and present evidence," and "assist[ing] [him] in collecting relevant and reasonably available information and in preparing for and presenting information to the CSRT." *Id.* at 132a-133a.

A military officer also served as the recorder for each CSRT. The recorder was charged with presenting evidence to the CSRT regarding whether the detainee should be designated as an enemy combatant, including any evidence suggesting that the detainee should *not* be so designated. App., *infra*, 137a-138a. Specifically, CSRT procedures required the recorder to "obtain and

examine the Government Information" to determine what materials should be presented to the CSRT. *Id.* at 145a. "Government Information" includes

> all reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings.

Id. at 129a. From that information, the recorder extracted the "Government Evidence" to present to the CSRT, which includes "such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant" as well as any evidence that "suggest[ed] that the detainee should not be designated as an enemy combatant." *Id.* at 137a-138a, 143a-144a. In advance of the CSRT hearing, the recorder prepared an unclassified summary of the Government Evidence and provided it to the detainee's personal representative. *Id.* at 144a.

In searching for and gathering material for the CSRTs, recorders relied most heavily on the two government databases most likely to contain information pertaining to detainees, the Joint Detainee Information Management System and the I2MS system. App., *infra*, 230a-232a. Those databases contain disseminated intelligence reports from other agencies, interrogation reports, and law enforcement records. *Ibid.* Given the scope and reliability of the material contained within those databases, they generally yielded the vast major-

ity of any Government Information about a detainee. *Id.* at 231a. Nonetheless, when material found in the two key databases suggested other sources of information to a recorder, the recorder pursued those sources of information to ensure that there was no other relevant, nonduplicative material to present to the CSRT. *Ibid.* If the additional information a recorder sought was sensitive classified information held by an intelligence agency, he was permitted to view the agency's files, but the files remained in the possession of the agency. See *id.* at 232a-233a.

Each CSRT hearing was presided over by "three neutral commissioned officers" who were not involved in the "apprehension, detention, interrogation, or previous determination of status of the detainee." App., *infra*, 114a-115a, 125a. Those officers reviewed the evidence presented by the recorder and the detainee, using a "rebuttable presumption * * * that the Government Evidence * * * is genuine and accurate," "determine[d] whether the preponderance of the evidence support[ed] the conclusion that [the] detainee m[et] the criteria to be designated as an enemy combatant," and "ma[de] a written assessment as to [the] detainee's status." *Id.* at 125a, 136a.

After each detainee's hearing, the recorder prepared and preserved the record of proceedings, which consisted of all the documentary evidence presented to the tribunal, the transcript of all witness testimony, a written report of the tribunal's decision, and an audio recording of the proceedings (except proceedings involving deliberation and voting by the members). App., *infra*, 140a-141a; see *id.* at 141a (stating that this material "constitute[d] the record" of each detainee's proceeding). Recorders did not, however, prepare a single file

containing all of the information they examined for a detainee's case or memorializing their thought processes in determining which leads to pursue in gathering the evidence to present to the CSRTs. *Id.* at 216a-217a.

Each CSRT determination was subject to mandatory review first by the CSRT Legal Advisor and then by the CSRT Director, both of whom utilized the record compiled by the recorder to assess the legal sufficiency of the CSRT determination. App., *infra*, at 127a, 141a-142a. After those reviews, a CSRT determination was considered "final." *Id.* at 143a.

In addition to the CSRT review process, the Department of Defense also conducts an annual administrative examination of whether it is appropriate to release or transfer any enemy combatant. See Paul Wolfowitz, Deputy Secretary of Defense, *Administrative Review Board Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba* (May 11, 2004) <http://www.defense link.mil/news/May2004/ d20040518gtmo review.pdf>. In addition, even after a final CSRT determination, a detainee or a person acting on his behalf may submit new evidence relating to the detainee's enemy combatant status at any time, and if that evidence is material, a new CSRT will be convened to consider it. App., *infra*, 179a-180a.

3. Congress provided a mechanism for federal judicial review of final CSRT determinations in the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, § 1005(e)(2), 119 Stat. 2739. Section 1005(e)(2) of the DTA provides that the Court of Appeals for the District of Columbia Circuit "shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly

detained as an enemy combatant." DTA § 1005(e)(2)(A), 119 Stat. 2742. The scope of that review is limited to assessing (1) whether the final CSRT decision "was consistent with the standards and procedures specified by the Secretary of Defense," including "the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence," and (2) "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." DTA § 1005(e)(2)(C), 119 Stat. 2742.

At the same time, Congress amended the federal habeas corpus statute to remove federal-court jurisdiction over habeas corpus petitions filed by detainees. See DTA § 1005(e)(1), 119 Stat. 2742. Congress reiterated and extended that jurisdictional limitation in the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, § 7(a), 120 Stat. 2636, providing that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus" filed by a Guantanamo Bay detainee, or have jurisdiction over "any other action" brought by a detainee "against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement," except an action authorized in Section 1005(e) of the DTA. See *Boumediene* v. *Bush*, 476 F.3d 981, 987 & n.3 (D.C. Cir. 2007), cert. granted, 127 S. Ct. 3078 (2007).

4. Numerous detainees have challenged the MCA's removal of federal-court jurisdiction over habeas petitions filed by Guantanamo Bay detainees and the adequacy of the judicial review of CSRT determinations available under the DTA and MCA. The District of Co-

lumbia Circuit rejected those challenges, *Boumediene* v. *Bush*, 476 F.3d 981 (2007), and this Court granted certiorari. *Boumediene* v. *Bush*, 127 S. Ct. 3078 (2007). *Boumediene* and its companion case, *Al Odah* v. United States, were argued on December 5, 2007, and are currently pending before this Court. *Boumediene* v. *Bush*, No. 06-1195 (argued Dec. 5, 2007); *Al Odah* v. *United States*, No. 06-1196 (argued Dec. 5, 2007). In its order granting certiorari in *Boumediene* and *Al Odah*, this Court noted that "it would be of material assistance to consult any decision" by the court of appeals in the present case. 127 S. Ct. 3078.

5. Respondents are foreign nationals captured abroad and detained at the naval base at Guantanamo Bay. App., *infra*, 3a. Each of them has been adjudicated by a CSRT to be an enemy combatant. *Id.* at 2a-3a. Respondents sought review of their CSRT determinations in the court of appeals under the DTA and requested wide-ranging discovery. *Ibid.* In order to evaluate respondents' discovery requests, the court of appeals—in the wake of its decisions upholding the MCA and DTA in *Boumediene* and *Al Odah*—determined that it was required to define "the record to which th[e] court must look as it reviews a CSRT's determination" and ordered briefing and argument on that question. *Id.* at 10a.

On July 20, 2007, the court of appeals issued a decision holding that the record on review "consists of all the information a Tribunal is authorized to obtain and consider," "hereinafter referred to as Government Information and defined by the Secretary of the Navy as such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an

enemy combatant." App., *infra*, 2a (internal quotation marked omitted); see *id.* at 38a. That is, the court defined the record for judicial review to include not only the evidence presented to and considered by the CSRT, but also every piece of potentially relevant, reasonably available information the recorder examined while identifying the materials to present to the CSRT. *Id.* at 2a, 12a-13a. The court then adopted a "presumption * * * that counsel for a detainee has a 'need to know' the classified information relating to his client's case, except that the Government may withhold from counsel, but not from the court, certain highly sensitive information." *Id.* at 3a.

The court of appeals provided two reasons for its holding. First, it stated that production of all Government Information was necessary to ensure that the recorder did not withhold any exculpatory information from the CSRT. App., *infra*, 13a-14a (reasoning that, unless the detainees' counsel had access to all information in the government's possession, there would be "no * * * way for the counsel to present an argument that the Recorder withheld exculpatory evidence from the Tribunal in violation of the specified procedures"). Second, the court explained that it could not "consider whether a preponderance of the evidence supports the Tribunal's status determination" "without seeing all the evidence." *Id.* at 14a-15a; see *id.* at 17a-18a.

6. On September 7, 2007, the government filed a petition seeking expedited rehearing and suggesting rehearing en banc. In support of its petition, the government submitted sworn declarations (both unclassified and classified) from the Directors of the Central Intelligence Agency, the National Security Agency, and the Federal Bureau of Investigation; the Director of

National Intelligence; and the Deputy Secretary of Defense, explaining the extraordinary burdens and national security risks created by the court's decision. See App., *infra*, 182a-239a.[1] The government also filed a motion to expedite consideration of its rehearing petition and any related proceedings, pointing to the fact that *Boumediene* and *Al Odah* were already pending before this Court.

a. On October 3, 2007, the panel of the court of appeals denied rehearing. In reaffirming its holding, the panel deemed it "irrelevant" that CSRT procedures were modeled on Army Regulation 190-8—which does not require that the military turn over any information in its possession to a detainee, App., *infra*, 59a—and that its holding requires the government to turn over more evidence to a detainee than the Constitution affords to United States citizens in criminal trials, *id.* at 60a (citing *Brady* v. *Maryland*, 373 U.S. 83 (1963)). Moreover, although the court acknowledged that, at the time of the CSRT determinations, recorders had no reason to "retain that portion of the Government Information [they] did not forward to the Tribunal," *id.* at 61a n.4, it nonetheless held that the government must either recreate such a record or "convene a new CSRT" for each detainee. *Id.* at 62a-63a.

b. On February 1, 2008, the en banc court of appeals issued an order denying the government's petition for rehearing en banc by a 5-5 vote. Five separate opinions accompanied that order. App., *infra*, 67a-102a.

i. Chief Judge Ginsburg, joined by Judges Rogers, Tatel, and Griffith, concurred in the denial of rehearing.

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[1] The unclassified versions of the documents are included in the appendix to this petition. The government will submit the classified versions to this Court if requested.

App., *infra*, 71a-82a. He reiterated the bases for the initial panel decision and restated the government's options under that decision: "either 'reassemble the Government Information it did collect or . . . convene a new CSRT.'" *Id.* at 77a (quoting opinion denying panel rehearing).

ii. Judge Garland separately concurred in the denial of rehearing. App., *infra*, 83a. He explained that he did not favor rehearing en banc for the sole reason that it would "plainly delay [the court of appeals'] decision and hence the Supreme Court's disposition of *Boumediene*." *Ibid.*

iii. Although she was a member of the original panel, Judge Henderson, joined by Judges Sentelle, Randolph, and Kavanaugh, dissented from denial of rehearing en banc, based on her serious concerns about the correctness of the panel's decision and its implications for national security. App., *infra*, at 83a-89a. Judge Henderson rejected the notion that the court was required to view all Government Information to conduct its review under the DTA, explaining that, in the criminal context, a court can review "whether the preponderance of the evidence supports a probable cause finding sufficient to hold an arrestee for trial without knowing (much less, reviewing) all the evidence in the prosecutor's possession." *Id.* at 85a. She also noted that, in the administrative agency context, a reviewing court has "no license to 'create' a record consisting of more than the agency itself had before it." *Id.* at 86a. And she acknowledged the enormous obligations the panel's decision would place on the government and the court, *id.* at 88a-89a & n.5, and noted that "the five officials— charged with safeguarding our country while we are now at war—

have detailed the grave national security concerns the [panel's] holding presents," *id.* at 88a.

iv. Judge Randolph, joined by Judges Sentelle, Henderson, and Kavanaugh, separately dissented from denial of rehearing en banc. App., *infra*, 90a-99a. He explained that the panel's holding "is contrary to the rule and the statute governing the contents of the record in cases such as these," "violates the restrictions on [the court's] jurisdiction in the [DTA]," and "risks serious security breaches for no good reason." *Id.* at 90a. In his view, 28 U.S.C. 2112(b) and Federal Rule of Appellate Procedure 16(a)—which the panel's decision did not even address—"make crystal clear" that "the record does not include information never presented to the [CSRT]." App., *infra*, 91a. And he noted that "[t]he Department of Defense regulation directly on point" reinforces that view. *Id.* at 91a n.2; see *id.* at 93a n.4. Finally, he expressed his concern that production of all Government Information would not assist in judicial review, while "its assembly and filing in this court, and potential sharing with private counsel, gives rise to a severe risk of a security breach." *Id.* at 95a.

v. Judge Brown also dissented from denial of rehearing en banc, stating that the court's "continuing debate suggests the court has not yet found the right paradigm." App., *infra*, 99a-102a. She too noted the enormity of the government's burden to either "conduct a new search" to construct a "theoretical record" or "reconvene [each] CSRT." *Id.* at 99a-100a & n.1.

REASONS FOR GRANTING THE PETITION

In *Boumediene* v. *Bush* and *Al Odah* v. *United States*, this Court is currently considering several crucial issues concerning the constitutionality of the MCA and DTA and the adequacy of the procedures and judicial review currently provided for captured enemy combatants to challenge their detention at the Guantanamo Bay Naval Station. As this Court recognized when it granted certiorari in those cases, see 127 S. Ct. 3078, the important question presented by this case concerning the scope of the record on review in an action brought under the DTA is in significant respects intertwined with the threshold issues pending before the Court in *Boumediene* and *Al Odah*.

If, for example, this Court in *Boumediene* and *Al Odah* reaches the question of the adequacy of the DTA procedures as a substitute for the review provided in common-law habeas in 1789, it may have an opportunity to interpret the procedures for DTA review, including the "record on review," so as to avoid any constitutional difficulties. If, on the other hand, this Court determines that detainees do not have Suspension Clause rights, it would highlight the importance of the procedures for DTA review, and the Court could either grant the petition outright at that point, or it could permit the court of appeals to revisit its ruling on the scope of the record for judicial review in light of the Court's explanation of what rights (if any) detainees have to judicial review. Either way, this Court's decision in *Boumediene* and *Al Odah* is likely to directly inform the question in this case.

At the same time, there is no reason to place the government in the dilemma created by the court of appeals' decision in this case while the *Boumediene* and *Al Odah*

cases are pending before this Court. As discussed, the decision below forces the government either to engage in a massive and practically infeasible attempt to recreate the Government Information the recorder might have reviewed under the court of appeals' decision at the risk of great harm to national security, or conduct an *en masse* remand of DTA cases for an additional round of CSRT proceedings in the midst of an ongoing armed conflict. Because it is possible that this Court's decision in *Boumediene* and *Al Odah* will obviate the need for either course and may require yet a third course, there is no reason to put the government to that choice while those cases are pending. Indeed, even if the Court's decision in *Boumediene* and *Al Odah* is adverse to the government and the government is required to convene new CSRT proceedings or the need for CSRT proceedings is mooted altogether, there is no reason to require the government to undertake this extraordinary task with attendant risks to national security before it has the benefit of this Court's guidance on what procedures are required.

The unprecedented nature of the District of Columbia Circuit's decision in this case and substantial divergence— underscored by the 5-5 split and the five separate opinions accompanying the denial of rehearing en banc—among the Judges of the District of Columbia Circuit on the scope of the record on review in DTA actions provides all the more reason for this Court to hold this case and delay execution of the judgment until the Court has an opportunity to consider and dispose of the case in light of its decision in *Boumediene* and *Al Odah*.

The court of appeals held that, in reviewing a CSRT determination that a detainee is an enemy combatant under the DTA, the record on review includes all reason-

ably available, relevant information within the possession of the United States government, even if the that material was not presented to or considered by the CSRT. That conception of the record on review is not only unprecedented in any administrative or judicial context, but it exceeds the constitutional requirements recognized by this Court in the ordinary criminal context. It disregards the DTA's explicit definition of the record on review, it is contrary to Congress's clear intent in providing limited judicial review of CSRT determinations, and it ignores the unique wartime context in which the proceedings at issue were conducted. Moreover, as the heads of the Nation's intelligence agencies explained in the sworn affidavits filed in support of rehearing en banc in the court of appeals, the District of Columbia Circuit's decision in this case imposes extraordinary burdens on the intelligence community and, if followed, would present a grave risk to national security.

Petitions under the DTA have already been filed on behalf of more than 180 detainees, and the court of appeals' ruling addressing the scope of the "record on review" will apply to each of them. To comply with the court of appeals' conception of the record on review, the government would be required to divert a significant portion of its intelligence, law enforcement, and military resources to either creating new "records" for DTA litigation or to conducting entirely new CSRT hearings for those detainees. As the leaders of the intelligence community have attested, and as several members of the court of appeals recognized in opinions dissenting from the denial of rehearing, that diversion of resources from critical national security duties during ongoing armed conflict threatens national security.

Because this case raises a question of great significance to our Nation's security in a time of war, and because the court of appeals' decision is fundamentally flawed, this case warrants plenary review in its own right. However, because the question presented by this case is interconnected with the *Boumediene* and *Al Odah* cases currently pending before the Court, the better course would be for this Court to hold this case pending the disposition of *Boumediene* and *Al Odah*. In the alternative, this Court should grant the petition and set this case for briefing and oral argument on an expedited schedule, so that the case may be considered this Term along with *Boumediene* and *Al Odah*.[2]

A. The Question Presented By This Case Is Intertwined With The Threshold Questions The Court Is Now Considering In *Boumediene* And *Al Odah*

In *Boumediene* and *Al Odah*, this Court is currently considering a variety of constitutional and statutory challenges to the restrictions on judicial review Congress enacted in the DTA and MCA. In particular, this Court is reviewing the court of appeals' holding in those cases that the DTA is the only means by which Guantanamo Bay detainees may challenge their detention as enemy combatants in federal court and considering the detainees' constitutional challenges to the adequacy of judicial review under the DTA. Pet. at i, *Boumediene* v. *Bush*, No. 06-1195 (argued Dec. 5, 2007); Pet. at i, *Al Odah* v. *United States*, No. 06-1196 (argued Dec. 5,

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[2] If the Court decides to grant plenary review and consider this case on the merits this Term, the government has proposed an expedited schedule for briefing and oral argument in its accompanying motion for expedited consideration of this petition.

2007); see also *Boumediene* v. *Bush*, 476 F.3d 981 (D.C. Cir.), cert. granted, 127 S. Ct. 3078 (2007).

The scope of the record on review in DTA actions is an important incident of the DTA and MCA scheme before the Court in *Boumediene* and *Al Odah*, and would figure prominently in any decision reaching the question of the adequacy of the DTA procedures as a substitute for habeas. Indeed, in denying rehearing en banc in this case, several members of the court of appeals expressly recognized the relationship between this case and the questions presented in *Boumediene* and *Al Odah*. See App., *infra*, 82a (Ginsburg, J., concurring in denial of rehearing en banc); *id.* at 83a (Garland, J., concurring in denial of rehearing en banc); *id.* at 89a n.6 (Henderson, J., dissenting from denial of rehearing en banc); *id.* at 96a (Randolph, J., dissenting from denial of rehearing en banc).

Moreover, this Court itself recognized that the question in this case is interrelated with *Boumediene* and *Al Odah* when it granted certiorari in those cases by taking the unusual step of asking the parties to file supplemental briefs in *Boumediene* and *Al Odah* once the court of appeals issued its decision in this case. See *Boumediene*, 127 S. Ct. 3078.[3] And the outcome in this case may be directly affected by the Court's decision in *Boumediene* and *Al Odah*.

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[3] Because the initial panel decision was issued before the merits briefing had concluded in *Boumediene* and *Al Odah*, the parties were able to address that decision in their merits briefs in those cases. In the meantime, as explained below, the government sought expedited rehearing in *Bismullah*. Because that petition was pending when the government filed its merits brief in *Boumediene* and *Al Odah*, and particularly given the page constraints for that brief, the government's discussion of *Bismullah* in that brief was not extensive.

If, for example, this Court in *Boumediene* and *Al Odah* reaches the question of whether the DTA procedures are an adequate substitute for the review provided by common-law habeas corpus, the Court may have occasion to address the scope of DTA review, perhaps including the record on review, directly. For example, the Court may interpret the provisions addressing DTA review in order to avoid any constitutional difficulties or grave doubts. If, on the other hand, this Court determines that detainees do not have Suspension Clause rights, it would not need to consider the adequacy of the DTA procedures directly. Nonetheless, that decision would only underscore the importance of the question presented in this petition. The Court could decide to either grant plenary review at that juncture or permit the court of appeals to revisit its ruling on the scope of the record for judicial review in light of the Court's explanation of what rights (if any) detainees have to judicial review.

In all events, this Court's resolution of the question of what constitutional rights, if any, detainees at Guantanamo Bay possess—a key issue in *Boumediene* and *Al Odah*—will necessarily inform the scope and nature of the court of appeals' review under the DTA, for the DTA specifically instructs the court to review, "to the extent the Constitution and laws of the United States are applicable," whether CSRT "standards and procedures" are "consistent with the Constitution and laws of the United States." DTA § 1005(e)(2), 119 Stat. 2742. Thus, this Court's resolution of the issues in *Boumediene* and *Al Odah* will have a material effect on the question presented in this case, and the government should not be required to expend the extraordinary resources re-

quired to comply with the court of appeals' decision until this Court has resolved *Boumediene* and *Al Odah*.

That is particularly true if the government is forced to follow the court of appeals' suggested recourse of voluntary remands in the likely event that it cannot comply with the decision's extraordinary record production—and, indeed, recreation—demands. Reconvening those CSRTs would impose extraordinary demands on the military in the midst of an ongoing armed conflict. And the entire exercise may be rendered either pointless or misdirected in relatively short order depending on the Court's resolution of *Boumediene* and *Al Odah*. Because it is possible that this Court's decision in *Boumediene* and *Al Odah* may call for additional changes to the CSRT rules, there is no reason for this Court to require the military to embark down the path of new CSRTs until, at a minimum, it has further guidance from this Court.

Accordingly, the Court should hold this petition pending *Boumediene* and *Al Odah* and dispose of it in accordance with the Court's decision in those cases. In the alternative, if this Court would prefer to resolve the questions presented in *Boumediene* and *Al Odah* together with the question presented in this case regarding the scope of the record on review in a DTA case, the Court should grant the petition and set this case for expedited briefing and argument, so that it may be considered with *Boumediene* and *Al Odah* this Term. The government has proposed an expedited briefing and argument schedule in the accompanying motion for expedited consideration of this petition.

B. The Court Of Appeals Committed Serious Legal Error

The court of appeals' definition of the record on review is contrary to well-settled principles of judicial review, to CSRT procedures, to Congress's intent in enacting the DTA, and to the decision of a plurality of this Court in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004).

1. It is a fundamental principle of judicial review that the record on review is generally limited to the materials presented to the initial decisionmaker. In the administrative agency context, for example, the court's "reviewing function is * * * ordinarily limited to consideration of the decision of the agency or court below and of the *evidence on which it was based*." *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 714-715 (1963) (emphasis added). As this Court recognized in *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729 (1985), the "fundamental principle[] of judicial review of agency action" is that "[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Id.* at 743 (internal quotation marks omitted). That is because it is the task of a reviewing court to consider the correctness of the decisionmaker's ruling based on the record before it, not based on some theoretical record that could have been compiled. Accordingly, a reviewing court generally has "no license to 'create' a record consisting of more than the agency itself had before it." App., *infra*, 86a (Henderson, J., dissenting from denial of rehearing en banc) (citing cases).

That well-settled principle is embodied in the statute governing administrative agency actions, 28 U.S.C. 2112(b) which applies by its plain terms to this case. Section 2112(b) provides that the "record to be filed in

the court of appeals" on a judicial review of an administrative agency action "shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned." An "agency," in turn, is defined to include "any department, independent establishment, commission, administration, authority, board or bureau of the United States," 28 U.S.C. 451. Federal Rule of Appellate Procedure 16(a), which implements Section 2112(b), states the same rule. Those provisions alone make "crystal clear" that the record on review of a CSRT determination "does not include information never presented to the [CSRT]." App., *infra*, 91a (Randolph, J., dissenting from denial of rehearing en banc).

The court of appeals held that the record for the court's review of a CSRT hearing consists of all Government Information, including information not actually presented to the tribunal. App., *infra*, 38a, 58a. That holding has no precedent in any administrative or judicial context, much less in the extraordinary military and national security context in which this case arises. Indeed, the court of appeals recognized as much, dismissing as "irrelevant" the government's analogies to administrative agency review, Geneva Convention proceedings, and criminal proceedings, on the ground that the judicial review authorized by the DTA is *sui generis*. *Id.* at 59a-63a. But to the extent that the context of DTA review is unique, it hardly calls for a *more* demanding record with *greater* risk to classified information than in any other context.

2. The court of appeals' construction of the Department of Defense procedures governing CSRTs is funda-

mentally flawed. Those procedures reflect the long-standing principle that the record on review is limited to the evidence presented to the tribunal. CSRT procedures distinguish between "Government Information" —all of the "reasonably available information in the possession of the U.S. Government bearing on" the question whether a detainee is an enemy combatant, App., *infra*, 129a—and "Government Evidence"—the evidence that the recorder presents to the CSRT to support the detainee's classification as an enemy combatant, *id.* at 138a—and make clear that the "record" consists only of the latter.

Indeed, CSRT procedures specifically define the record of proceedings as the evidence submitted to the tribunal by the recorder and the detainee, the tribunal's ruling, and the audio file of proceedings. App., *infra*, 140a-141a. After a CSRT hearing, the recorder compiles that record and provides it to the detainee's personal representative, who may "submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record." *Id.* at 147a. That record is then submitted to the presiding officer of the tribunal for certification, after which that "completed record is considered the official record of the Tribunal's decision." *Ibid.* That official record is used by the CSRT Legal Advisor and CSRT Director to review the legal sufficiency review of all CSRT rulings before those rulings become final. *Id.* at 141a-142a. And that record likewise should be utilized in judicial review under the DTA, consistent with the traditional rule regarding the content of the record on judicial review.

The text of the DTA and the context in which it was enacted reinforce that the record in a DTA case is lim-

ited to the evidence actually presented to a CSRT, *i.e.*, the Government Evidence and the detainee's evidence. When Congress enacted the DTA, it was well aware of the existing CSRT procedures, including the definition of the record of the proceedings. App., *infra*, 141a. And Congress authorized only a narrow form of review under the DTA, permitting the court of appeals to review a "final decision" of a CSRT only to ensure (1) that it was "consistent with the standards and procedures specified by the Secretary of Defense," "including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence," and (2) that, "to the extent the Constitution and laws of the United States are applicable," the "standards and procedures [used] to make the determination is consistent with the Constitution and laws of the United States." DTA § 1005(e)(2), 119 Stat. 2742. That narrow review indicates that Congress did not intend far-reaching judicial review, particularly judicial review that would go beyond any known administrative or judicial context. Instead, it indicates that Congress intended the court of appeals to ensure that the Department of Defense followed its own rules and had sufficient evidence on the record before it to find that a detainee is an enemy combatant.

Moreover, the legislative history of the DTA makes clear that Congress was attempting to *narrow* the scope of review of detainees' claims, not invite a wide-ranging inquiry into materials that were not even presented to the CSRTs. See, *e.g.*, 152 Cong. Rec. S10,403 (daily ed. Sept. 28, 2006) (statement of Sen. Cornyn) (DTA "substitute[s] the blizzard of litigation instigated by *Rasul* v. *Bush* with a narrow DC Circuit-only review of the Combatant Status Review Tribunal—CSRT—hearings,"

which is "by design" because "[c]ourts of appeals do not hold evidentiary hearings or otherwise take in evidence outside of the administrative record"); *id.* at S10,268 (daily ed. Sept. 27, 2006) (statement of Sen. Kyl) (the "DTA does not allow re-examination of the facts underlying a * * * detention, and it limits the review to the administrative record").

Nothing in the Constitution, the DTA's text, or historical precedent calls for imposing a different and exponentially more intrusive record production regime in the context of status determinations of foreign nationals held by the military abroad as enemy combatants. To the contrary, one of the motivating principles of the DTA was that the unique circumstances of wartime detentions called for rules that provided a fair process but also were responsive to the extraordinary demands faced by the military in the midst of an ongoing armed conflict. It is inconceivable that as Congress sought to displace traditional habeas review it intended to impose a record review regime far more extensive than any production requirement found in a criminal proceeding or in habeas.

3. The court of appeals proffered two justifications for its ruling, neither of which is correct. First, the court stated that it cannot determine whether the recorder withheld any potentially exculpatory evidence, in violation of CSRT procedures, without being able to examine for itself all relevant, reasonably available information in the government's possession. App., *infra*, 11a-16a. That explanation incorrectly conflates two distinct issues: (1) what constitutes the administrative record in a DTA case and (2) what is the appropriate process and remedy (if any) in the event a detainee alleges that the Department of Defense failed to comply with its own

rules requiring inclusion of exculpatory evidence in the administrative record. Although the DTA permits the court of appeals to consider a detainee's claim that the Department of Defense did not follow its own procedures, it does not follow that the ability to bring such a challenge automatically expands the record in the manner envisioned by the court of appeals.

There is no need to disturb ordinary conceptions of record review to ensure that exculpatory information is not improperly withheld. Consistent with the Department of Defense's own rules, in conducting CSRTs, the Department has always sought in good faith to provide Tribunals with any pertinent reasonably available information of which it is aware that a detainee is not an enemy combatant (*i.e.*, "exculpatory information"). The government has no interest in detaining individuals who are not enemy combatants. In addition, when the Department subsequently becomes aware that previously undisclosed exculpatory information exists, the Department will advise the court of appeals and submit the information for review under the Secretary's rules governing consideration of new evidence. See App., *infra*, 176a-181a.

The court of appeals, however, erroneously conflated the concept of record on review with the Department's efforts to identify information that a detainee is not an enemy combatant. Indeed, even in the domestic criminal context where the Due Process Clause applies and requires the prosecution to provide exculpatory information to the defendant, see *Brady* v. *Maryland*, 373 U.S. 83 (1963), "[t]here is no general constitutional right to discovery," *Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977), and there is no requirement that the prosecution open up its files so a court or defendant may evaluate

whether the prosecution has produced the evidence required by rule, statute, or the Constitution. See 18 U.S.C. 3500 (Jencks Act); Fed. R. Crim. P. 16(a).

Instead, the Constitution generally presumes that the government furnishes exculpatory evidence as part of the criminal justice process, and there is no standing obligation that the prosecution turn over "the Commonwealth's files." *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 59 (1987). There certainly is no free-standing requirement in the criminal context—like the court imposed here—that the government turn over all information in its files so that the courts can determine what should be produced to the defendant. That is true even if the defendant is a United States citizen, who possesses full constitutional rights. Cf. U.S. Br. at 14-25, *Boumediene* v. *Bush* and *Al Odah* v. *United States*, Nos. 06-1195 & 06-1196 (argued Dec. 5, 2007) (arguing that Guantanamo Bay detainees lack Suspension Clause rights). Yet, in such circumstances, the courts are fully able to conduct the necessary judicial review. App., *infra*, 85a (Henderson, J., dissenting from denial of rehearing en banc).

The court of appeals' second rationale is that production of all Government Information was necessary for the Court to "consider whether a preponderance of the evidence supports the Tribunal's status determination." App., *infra*, 14a-15a. That reasoning, too, is mistaken, because it is well-settled that the "preponderance of the evidence" standard refers to the evidence presented to the court, not to some other set of information. See, *e.g.*, *Gould* v. *United States*, 160 F.3d 1194, 1197 (8th Cir. 1998); see also, *e.g.*, 1 Christopher B. Mueller & Laird C, Kirkpatrick, *Federal Evidence* § 65, at 319-320 (2d ed. 1994). Again, the court of appeals has confused two separate concepts—whether the government has met its

burden of proof on the relevant record and the scope of the record itself. See App., *infra*, 14a-15a. The court of appeals is well able to determine whether a detainee's designation as an enemy combatant is supported by a preponderance of the evidence based on the record before the CSRT, just as reviewing courts routinely judge the sufficiency of a party's evidence based on the materials actually presented to the decisionmaker.

The fact that some detainees may wish to raise procedural challenges to the Defense Department's compliance with its procedures for compiling the administrative record or question the sufficiency of the evidence does not distinguish this context from other cases filed under 28 U.S.C. 2112(b) and Rule 16(a) of the Federal Rules of Appellate Procedure. Under those rules, when a party challenging an agency order argues that material was improperly excluded from the record, the court considers the challenger's claims and the evidence he produced in support, *NRDC* v. *Train*, 519 F.2d 287, 291-292 (D.C. Cir. 1975), and the court may determine, based upon that submission, "such additional explanations of the reasons for the agency decision as may prove necessary," *Environmental Defense Fund, Inc.* v. *Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981). In the DTA context, as in the administrative context generally, "if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation," *Florida Power & Light*, 470 U.S. at 744, rather than automatically transform the record from that considered by the agency into some broader, amorphous class of material that the agency did not consider.

4. The court of appeals' decision in this case also is at odds with the decision of a plurality of this Court in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004). The *Hamdi* plurality addressed the process due an American citizen detained as an enemy combatant in the United States. In doing so, the plurality expressly approved of the process under Army Regulation 190-8, which is used to determine the status of enemy detainees under the Geneva Convention. *Id.* at 538. In addition, the plurality rejected "extensive discovery of various military affairs" and anything "approach[ing] the process that accompanies a criminal trial," *id.* at 528; see also *id.* at 538; *In re Yamashita*, 327 U.S. 1, 17 (1946). In particular, the plurality rejected the procedure ordered by the district court in *Hamdi*, which envisioned the government turning over all of the raw materials in its file relevant to the determination that Hamdi was an enemy combatant. 542 U.S. at 513-514, 532-533. The parallels between the discovery ordered in *Hamdi*—and rejected by this Court—and the record envisioned by the decision below are striking. Indeed, the court of appeals' decision in this case categorically imposes on the military—with respect to foreign nationals held abroad—record production demands that far exceed those *invalidated* by the plurality under the Due Process Clause with respect to the citizen enemy combatant in *Hamdi*.

C. The Question Presented Is Exceptionally Important

As the court of appeals itself acknowledged, the record-production requirements mandated by the decision below would require the government to divert limited resources from an ongoing armed conflict for use in either attempting to recreate new "records" for each detainee's case or convening new CSRTs for each detainee.

In fact, the leaders of our Nation's intelligence community filed detailed declarations with the court of appeals explaining both the government's difficulty with complying with the court's holding and the harms to national security that likely will result if the government attempts to comply. See App., *infra*, 182a-214a. The extraordinary importance of the question presented counsels in favor of holding this case for *Boumediene* and *Al Odah* or granting the petition and setting it for expedited review.

1. Creation of the "record," as defined by the court below, would be a monumental undertaking for the government. As the court of appeals acknowledged, the government does not possess a file of materials reviewed by each CSRT recorder for each detainee, and its "failure" to create such a file is completely understandable. See App., *infra*, 61a-62a & n.4. Beyond two comprehensive databases most commonly used to compile material on detainees, see pp. 4-5, *supra*, there were any number of other sources, from any number of government agencies, that recorders could consult in search of potentially relevant material. Because there is no record of where each particular recorder looked, recompiling the record would entail a massive undertaking of identifying *any* potentially relevant material in the possession of *all* of those agencies in *each* DTA case. App., *infra*, 216a-218a.

In an effort to comply with the decision of the court of appeals, the government has, for a limited set of cases, assessed the effort required to create new "records" for all CSRT determinations. App., *infra*, 217a-222a. After expending hundreds of man-hours on this effort, the government has concluded that it would be an extraordinary undertaking, and a massive diversion of in-

telligence, law enforcement and military resources, for the government to recreate the Government Information in all of the approximately 180 pending DTA cases. See App., *infra*, 192a-195a; *id.* at 218a, 222a-223a. And, after collecting that information, the government would be required to review line-by-line all relevant classified information before producing it to the court of appeals and to counsel for the detainee. *Id.* at 188a; *id.* at 195a. Those tasks would divert vital intelligence analysts from their duties for a lengthy period of time (most likely years). *Id.* at 219a-220a, 223a.

2. In addition to requiring significant expenditure of government resources, the production of materials required by the decision below would pose a grave threat to national security. The heads of the intelligence agencies each filed declarations with the court of appeals detailing those security risks, see App., *infra*, 182a-214a, and several judges on the court of appeals noted those risks as well, see *id.* at 88a (Henderson, J., dissenting from denial of rehearing en banc); *id.* at 95a-96a (Randolph, J., dissenting from denial of hearing en banc).

The material that the government would be required to disclose as part of the "record" likely would include highly sensitive classified material, including material from foreign intelligence sources and "a vast number of the CIA's most sensitive classified documents on counterterrorism intelligence and operations." App., *infra*, 184a. Although, under the court of appeals' protective order, that material would be provided only to the detainee's counsel and the court of appeals, that disclosure could still seriously disrupt the Nation's intelligence gathering programs and cause "exceptionally grave damage to the national security." *Id.* at 187a; accord *id* at 211a; *id.* at 205a-206a. That is because the required

disclosure of sensitive information, even if no material is ever inadvertently disclosed beyond counsel and the court, will make foreign governments and human sources less likely to cooperate in the United States' intelligence gathering in the future.

As the Director of the Central Intelligence Agency explained, compliance with the court of appeals' decision would require disclosure of material derived from or provided by foreign intelligence services or sensitive human sources, often pursuant to "assurances of confidentiality," and when that material is disclosed, there will be "a high probability that" those sources "will decrease their cooperation" in the future, impairing our ability to gather intelligence. App., *infra*, 186a-187a. Further, he explained that unauthorized disclosures (beyond disclosures to counsel and to the court of appeals) are "inevitable," and such disclosures would "eviscerate the U.S. Government's carefully conceived plan to keep its most highly sensitive information compartmentalized." *Id.* at 188a; see also *id.* at 196a (discussing similar risks).

The Director of the National Security Agency likewise stated that the decision below "create[s] a very real danger of disclosure (intentional or inadvertent) of sensitive intelligence information, to include sources and methods of collection." App., *infra*, 203a-204a (citing 50 U.S.C. 402 note). And the Director of National Intelligence confirmed that the decision below "risk[s] public disclosure of classified intelligence information, sources, and methods, thereby enabling adversaries of the United States to avoid detection by the U.S. Intelligence Community and/or take measures to defeat or neutralize U.S. intelligence collection." *Id.* at 211a.

3. The court of appeals' response to the extraordinary burdens and national security risks created by its decision was to place the government on the horns of a dilemma: either attempt to recreate the Government Information the recorder might have viewed or conduct a new CSRT hearing for each detainee. App., *infra*, 62a-63a. As discussed, the former option is virtually infeasible. And the latter option is equally problematic, if not more so, and would make no sense as a short-term option in light of the likelihood that this Court will provide further guidance in *Boumediene* and *Al Odah*. That option would require, in the midst of an ongoing armed conflict, the commitment of massive resources to redo up to 275 CSRTs (*i.e.*, for the 180 DTA petitioners and the other Guantanamo Bay detainees, if they also seek DTA review). In addition to consuming a massive amount of time and resources, conducting new CSRTs for hundreds of detainees would inevitably delay the detainees' ability to seek federal court review of their enemy combatant status, thereby hampering the system of review established by Congress in the DTA. And all of that effort may go for naught depending on how this Court resolves *Boumediene* and *Al Odah*. At a minimum, the government should not be required to bear that unprecedented burden until the Court has disposed of this case in accordance with its decision in *Boumediene* and *Al Odah*.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Boumediene* v. *Bush* and *Al Odah* v. *United States*. Once those cases have been decided, the petition should be disposed of as appropriate in light of that decision.

In the alternative, the petition should be granted and this case should be set for expedited briefing and oral argument, so that the case may be decided this Term.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

JONATHAN F. COHN
Deputy Assistant Attorney General

NICOLE A. SAHARSKY
Assistant to the Solicitor General

DOUGLAS N. LETTER
ROBERT M. LOEB
AUGUST E. FLENTJE
CATHERINE Y. HANCOCK
JENNIFER PAISNER
Attorneys

FEBRUARY 2008

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 06-1197, 06-1397

HAJI BISMULLAH A/K/A HAJI BISMILLAH, AND A/K/A HAJI BESMELLA

HAJI MOHAMMAD WALI, NEXT FRIEND OF HAJI BISMULLAH, PETITIONERS

v.

ROBERT M. GATES, SECRETARY OF DEFENSE, RESPONDENT

HUZAIFA PARHAT, ET AL., PETITIONERS

v.

ROBERT M. GATES, SECRETARY OF DEFENSE, ET AL., RESPONDENTS

Argued: May 15, 2007
Decided: July 20, 2007
As Amended: Oct. 23, 2007

OPINION

Before: GINSBURG, Chief Judge, and HENDERSON and ROGERS, Circuit Judges.

Opinion for the court filed by Chief Judge GINSBURG.

Concurring opinion filed by Circuit Judge ROGERS.

GINSBURG, Chief Judge:

Petitioners are eight men detained at the Naval Station at Guantánamo Bay, Cuba. Each petitioner seeks review of the determination by a Combatant Status Review Tribunal (CSRT or Tribunal) that he is an "enemy combatant." In this opinion we address the various procedural motions the parties have filed to govern our review of the merits of the detainees' petitions. The petitioners as a group and the Government each propose the court enter a protective order to govern such matters as access to and handling of classified information; the petitioners move to compel discovery and for the appointment of a special master; and the Government asks the court to treat the seven petitioners who filed the joint petition in *Parhat v. Gates* (No. 06-1397) as though each had filed a separate petition to review his status determination.

In order to review a Tribunal's determination that, based upon a preponderance of the evidence, a detainee is an enemy combatant, the court must have access to all the information available to the Tribunal. We therefore hold that, contrary to the position of the Government, the record on review consists of all the information a Tribunal is authorized to obtain and consider, pursuant to the procedures specified by the Secretary of Defense, hereinafter referred to as Government Information and defined by the Secretary of the Navy as "such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant," which includes any information presented

to the Tribunal by the detainee or his Personal Representative.

In addition, we must implement such measures to govern these proceedings as are necessary to enable us to engage in meaningful review of the record as defined above. Therefore, we will enter a protective order adopting a presumption, as proposed by the petitioners, that counsel for a detainee has a "need to know" the classified information relating to his client's case, except that the Government may withhold from counsel, but not from the court, certain highly sensitive information. The protective order also will provide that the Government may inspect correspondence from counsel to a detainee, including "legal mail," and redact anything that does not pertain to the events leading up to the detainee's capture and culminating in the conduct of his CSRT, including such events in between as bear upon the decision of the Tribunal or our review thereof. Finally, the protective order will provide that a lawyer offering his or her services may, as the petitioners propose, have up to two visits with a detainee in order to obtain the detainee's authorization to seek review of the CSRT's determination of his status.

Before entering the protective order, the court will give the parties an opportunity to suggest changes.

I. Background

Each petitioner is a foreign national captured abroad and held at Guantánamo, seeking review of a decision of a CSRT determining that he is an "enemy combatant" and therefore subject to detention for the duration of hostilities. Haji Bismullah was captured in Afghanistan in 2003. Huzaifa Parhat and the six other detainees join-

ing his petition are ethnic Uighurs who allege they were captured in Pakistan in approximately December 2001.

A. The Regulations

In a July 2004 Memorandum for the Secretary of the Navy, the Secretary of Defense established skeletal procedures for the conduct of CSRT proceedings with respect to foreign nationals held at Guantánamo to "review the detainee's status as an enemy combatant." The Secretary of the Navy, who was "appointed to operate and oversee [the CSRT] process," promptly issued a memorandum specifying detailed procedures (Navy Memorandum), which are still in effect.*

Pursuant to those procedures, a CSRT reviews the determination, made after "multiple levels of review by military officers and officials of the Department of Defense," (E-1 § B) that a detainee is an "enemy combatant," defined as "an individual who was part of or supporting Taliban or Al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." (E-1 § B) A Tribunal is composed of "three neutral commissioned officers" who were not involved in the "apprehension, detention, interrogation, or previous determination of status of the detainee[]." (E-1 § C(1)) The Tribunal is to "determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant." (E-1 § B) There is a rebuttable presumption that the Government Evidence, defined as "such evidence in the Government In-

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* The Secretary of the Navy attached to his memorandum three "enclosures," to which we refer below in our citations to the CSRT procedures as "E-1," "E-2," and "E-3."

formation as may be sufficient to support the detainee's classification as an enemy combatant" (E-1 § H(4)) is "genuine and accurate" (E-1 § G(11)).

The Tribunal is authorized to request the production of "reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant," (E-1 § E(3)) and the Recorder, a military officer, is charged with obtaining from government agencies and reviewing all such Government Information (E-2 § C(1)). The Recorder must present, orally or in documentary form (E-2 § C(6)), both the Government Evidence and, if any there be in the Government Information, all "evidence to suggest that the detainee should not be designated as an enemy combatant." (E-1 § H(4), E-2 § B(1)) In advance of the Tribunal hearing, the Recorder must prepare an unclassified summary of the relevant Government Information and provide the summary to the detainee's Personal Representative, also a military officer. (E-2 § C(2), (4))

Each detainee's Personal Representative reviews the Government Evidence the Recorder plans to present to the Tribunal (E-3 § C(3)), has access to the Government Information (E-3 § C(2)), and meets with the detainee to explain the CSRT process. The Personal Representative may not, however, share classified information with the detainee. (E-3 § C(4)) The Personal Representative "shall present information to the Tribunal if the detainee so requests" and "may, outside the presence of the detainee, comment upon classified information submitted by the Recorder." (E-3 § C(5)) The detainee may testify or introduce relevant documentary evidence at the hearing, but may not be compelled to answer ques-

tions. (E-1 § F(6)-(7)) He also may present the testimony of any witness who is "reasonably available and whose testimony is considered by the Tribunal to be relevant." (E-1 § F(6))

After the hearing, the Recorder compiles a "Record of Proceedings," consisting of (1) a statement of the time and place of the hearing and the names of those present; (2) the Tribunal Decision Report cover sheet,* which is accompanied by (a) the classified and unclassified reports made by the Recorder "upon which the Tribunal decision was based" and (b) copies of all documentary evidence presented to the CSRT; (3) a summary prepared by the Recorder of each witness's testimony; and (4) the summary report written by any dissenting member of the Tribunal. (E-2 § C(8), E-1 § G(12))

Each Tribunal has a "Legal Advisor" with whom the members may consult regarding legal, evidentiary, procedural, and like matters. (E-1 § C(4)) The Legal Advisor reviews for legal sufficiency both the CSRT's rulings on whether witnesses and evidence are reasonably available and its ultimate determination of the detainee's status. (E-1 § I(7)) The Legal Advisor forwards the Record of Proceedings to the "Director, CSRT," (E-1 § I(5)) who reviews the decision as well. (E-1 § I(8), E-2 § C(10)) If approved by the Director, CSRT, then the decision becomes final. (E-1 § I(8))

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* A Tribunal member designated by the Tribunal President (E-1 § H(9)) must "document the Tribunal's decision on the [CSRT] Report cover sheet . . . which [serves] as the basis for the Recorder's preparation of the Tribunal record."

B. The Statutes

In December 2005 the President signed into law the Detainee Treatment Act (DTA), Pub. L. No. 109-148, § 1005(e)(2)(A), 119 Stat. 2742-43, which vests in this court exclusive jurisdiction "to determine the validity of any final decision of a [CSRT] that an alien is properly detained as an enemy combatant." Section 1005(e)(2)(C) of the Act provides:

> The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of—
>
> > (i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and
> >
> > (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

Soon after arriving at Guantánamo, many a detainee, either personally or through a "next friend" acting on his behalf, sought release by filing a petition for a writ of habeas corpus in the district court. Beginning in January 2006, after the DTA was enacted, some detainees,

including the petitioners, filed in this court petitions seeking both review of a status determination by a CSRT and a writ of habeas corpus. *See, e.g., Paracha v. Gates*, No. 06-1038. In October 2006 the Congress passed and the President signed into law the Military Commissions Act (MCA), Pub. L. No. 109-366, § 7, 120 Stat. 2635-36, which stripped the district court of jurisdiction over habeas petitions filed by or on behalf of "an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." MCA § 7(a), 28 U.S.C. § 2241(e)(1). Meanwhile, we had stayed the petitions filed in the court of appeals, including those of Bismullah and the Parhat Petitioners, pending this court's decision in *Boumediene v. Bush*, 476 F.3d 981, 990-91, *cert. denied*, —U.S. —, 127 S. Ct. 1478, 167 L. Ed. 2d 578, *cert. granted*, —U.S. —, 127 S. Ct. 3078, ___ L. Ed. 2d ___ (2007). In that case we held that, because the common law writ of "habeas corpus would not have been available in 1789 to aliens without presence or property within the United States," the Congress did not violate the Suspension Clause of the Constitution, U.S. Const. art. I, § 9, cl. 2, when it stripped the federal district court of jurisdiction to hear any habeas petition filed by "an alien detained by the United States." We now take up the motions pending in the petitioners' DTA cases.

C. The Motions

In order to resolve preliminary issues before this court reviews the merits of their claims, all the petitioners filed motions to (1) enter the protective order previously entered by the district court in all habeas cases brought by Guantánamo detainees (Status Quo Order);

(2) compel discovery, allowing the petitioners to gather all evidence available to the Government at the time the CSRT was held and to present to the court such evidence as was not presented to the CSRT; and (3) appoint a special master to hold hearings and make factual findings, as necessary to address disputes arising from the proposed protective and discovery orders. In his motion to compel discovery, Bismullah also seeks counsel access to (1) the Record of Proceedings (classified and unclassified) before his CSRT; (2) the Government Information regarding Bismullah; (3) any statements or letters in support of Bismullah; (4) other documents relating to Bismullah's CSRT, including "records, notes, memoranda and correspondence of the Tribunal members, Recorder, Personal Representative, or other person who participated in Bismullah's CSRT"; and (5) other "reasonably available documents or information in the possession of the U.S. government" bearing upon whether Bismullah meets the criteria to be designated an enemy combatant.

In their motion to compel discovery, the Parhat Petitioners seek counsel access to (1) the CSRT records (classified and unclassified) for all seven Parhat Petitioners and for 13 other Uighur men allegedly taken into custody at the same time and place; (2) records created in Kandahar, Afghanistan or Guantánamo regarding any Parhat Petitioner's status as an enemy combatant; (3) records of the State Department's effort to persuade foreign governments to grant asylum to any of the 20 Uighurs, including the Parhat Petitioners; (4) the Government's files regarding interrogation of each Parhat Petitioner; (5) records concerning the conduct of the Recorder in all CSRT proceedings concerning any of the Parhat Petitioners; (6) records concerning any visit to

Guantánamo of any official of the People's Republic of China in order to interrogate any Uighur detainee, upon which interrogation the petitioners are concerned the Tribunal may have relied in designating them enemy combatants; and (7) records concerning any Parhat Petitioner's affiliation with the East Turkistan Islamic Movement, which the Government designated a "terrorist organization" pursuant to 8 U.S.C. § 1182(a)(3)(B)(vi)(II) more than two years after the Parhat Petitioners allege they were captured, *see* 69 Fed. Reg. 23,555 (2004), and with which the Parhat Petitioners allege, in apparent anticipation of the Government Evidence, they have no affiliation.

For its part, the Government moves the court to enter a substantially revised version of the protective order entered by the district court (Government's Proposed Order), before the entry of which it apparently refuses to turn over to counsel for the petitioners any classified information and "any information designated by the Government as protected information." The Government also proposes the court treat the petition filed by the seven Parhat Petitioners as seven separate petitions.

II. Analysis

The parties fundamentally disagree about what constitutes the record to which this court must look as it reviews a CSRT's determination that a petitioner is an enemy combatant. The parties agree that the court should enter a protective order before the Government gives counsel for the petitioners (all of whom have the requisite security clearance) access to classified and protected information, and that the protective order must provide a method for counsel to communicate to a

detainee nonclassified but confidential information, in writing and in person. The parties disagree, however, over several particulars. The petitioners ask the court to enter the protective order entered by the district court in the aforementioned habeas cases, and the Government proposes a substantially different order.

A. The Record

The petitioners argue the court must look beyond the Record of Proceedings and consider all evidence reasonably available to the Government, which may include evidence neither the Recorder nor the detainee's Personal Representative nor the detainee put before the CSRT. In addition, they point out that many of the procedures specified by the Department of Defense for the conduct of a CSRT address steps to be taken before the hearing, and argue that therefore the court must have available to it information sufficient to enable review of a detainee's claim that the Government did not comply with a pre-hearing procedure. For example, Bismullah contends, on information and belief, that the Recorder for his proceeding failed to gather and examine potentially exculpatory evidence and to present that evidence to the Tribunal. Bismullah also alleges the Tribunal acted arbitrarily and capriciously by, for example, ruling that Bismullah's brother was not "reasonably available" to testify or submit an affidavit. The Parhat Petitioners similarly allege the Recorder failed to present the Tribunal with statements made by military interrogators advising them as early as 2003 that they soon would be released. The Parhat Petitioners also seek information regarding other Uighur detainees in order to support their claims that the Government acted arbitrarily by finding the Parhat Petitioners to be enemy combatants

while finding similarly situated detainees were not enemy combatants. Finally, the petitioners contend that, even if the court does not review the Government's compliance with pre-hearing procedures, they are entitled to discovery directed at determining whether exculpatory material was withheld from the Tribunal.

The petitioners propose not only to compel discovery but also to supplement the record with such evidence as they discover relevant to their claims. As counsel for the petitioners said at oral argument, their request is "not strictly speaking for discovery [but] for the court to have the complete record before it." Here they rely upon *NRDC v. Train*, 519 F.2d 287, 291-92 (D.C. Cir. 1975), in which we held that after the plaintiffs made a "substantial showing" that the EPA had not filed with the court the entire administrative record of the matter under review, they were "entitled to an opportunity to determine, by limited discovery, whether any other documents which [were] properly part of the administrative record had been withheld." Thus, the petitioners contend the court appropriately considers supplemental extra-record information when the "procedural validity of the [agency's] decision" is "under scrutiny," *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989), because, for example, the agency excluded documents that might have been adverse to its decision, *see Kent County, Del. Levy Court v. EPA*, 963 F.2d 391, 395-96 (D.C. Cir. 1992).

The Government's position is that the record before the court is properly limited to the Record of Proceedings, as compiled by the Recorder. According to the Government, the plurality in *Hamdi v. Rumsfeld*, 542 U.S. 507, 538, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004),

"rejected free-wheeling discovery" for even a citizen detained as an alleged enemy combatant as long as there was a formal military proceeding "akin" to a CSRT in which the detainee could present his version of the facts. The Government believes that by directing this court to "determine the validity of any final decision of a Combatant Status Review Tribunal," DTA § 1005(e)(2)(A), the Congress intended to "evoke[ ] this Court's familiar function of reviewing a final administrative decision based upon the record before the agency." In support of that position and the lack of any need for discovery, the Government contends the Record of Proceedings is sufficient for meaningful review by the court, because a ruling on the reasonable availability of a witness or of evidence must be made on the record; the Personal Representative's communication to the detainee is largely scripted, leaving no need to produce "[his] notes, memoranda and correspondence"; and the actions of the Recorder, whose task is routine and subject to a strong "presumption of regularity," is subject to challenge by the detainee, who may testify on his own behalf, and by the detainee's Personal Representative, who may review the Government Information.

We approach questions concerning the content of the record we are to review mindful that the DTA directs this court to "determine the validity" of a Tribunal's "status determination" with particular reference to whether it was made "consistent with the standards and procedures specified by the Secretary of Defense, . . . including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence." DTA § 1005(e)(2). As the petitioners point out, many of the procedures specified by the Secretary relate to steps the Recorder and others must take before the Tribunal

holds a hearing. In order to review compliance with those procedures, the court must be able to view the Government Information with the aid of counsel for both parties; a detainee's counsel who has seen only the subset of the Government Information presented to the Tribunal is in no position to aid the court. There is simply no other way for the counsel to present an argument that the Recorder withheld exculpatory evidence from the Tribunal in violation of the specified procedures. Even if the Recorder's actions are entitled to a presumption of regularity, as the Government maintains—but which is not at all clear because a CSRT does not have the transparent features of the ordinary administrative process and the Recorder is not the final agency decisionmaker, *see Martino v. U.S. Dep't of Agric.*, 801 F.2d 1410, 1412-13 (D.C. Cir. 1986)—that presumption is not irrebuttable,* *see, e.g., NRDC v. SEC*, 606 F.2d 1031, 1049 n.23 (D.C. Cir. 1979) (listing methods of rebutting presumption of regularity); but it would be irrebuttable, in effect, if neither petitioners' counsel nor the court could ever look behind the presumption to the actual facts. In addition, the court cannot, as the DTA charges us, consider whether a preponderance of the evidence supports the Tribunal's status determination without seeing all the evidence, any more than one

* Insofar as the task of gathering Government Information was performed by someone other than the Recorder, Decl. of Rear Admiral (Retired) James M. McGarrah ¶¶ 4-6 (May 31, 2007), as our concurring colleague points out may have happened, or the Recorder has failed altogether to gather certain Government Information, as Bismullah alleges, a panel reviewing the merits of a CSRT status determination will be in a position to resolve whether the procedure followed was "consistent with the standards and procedures specified by the Secretary of Defense for [a CSRT]." DTA § 1005(e)(2)(C)(i).

can tell whether a fraction is more or less than one half by looking only at the numerator and not at the denominator.

The petitioners argue that once counsel have seen the Government Information relative to a particular detainee, they may need discovery in order to ensure "the Government has actually collected all [documents it is required to collect]." They believe, that is, they may be able to make a particularized showing of need for specific documents in addition to those obtained by the Recorder.

We deny the petitioners' motions to compel discovery, without prejudice to renewal, because they have not made a showing sufficient to justify compelling discovery at this stage of these proceedings. First, the petitioners do not need discovery in order to challenge a CSRT's ruling that a requested witness or item of evidence was not "reasonably available"; as the Government points out, that ruling must be made on the record, which should be sufficient to determine whether the Tribunal acted in accordance with the specified procedures. Nor does a detainee petitioner need information regarding the conduct of another detainee's CSRT proceeding. Such information is not relevant to our review, and therefore not necessary for a counsel's representation of his detainee client; the Act authorizes this court to "determine the validity of any final decision of a [CSRT]," DTA § 1005(e)(2)(A), and our jurisdiction under the Act is expressly "limited to the consideration of" whether a detainee's status determination was "consistent with the standards and procedures specified by the Secretary of Defense for [a CSRT]," including the requirement that the Tribunal's status determination be supported by a

preponderance of the evidence, DTA § 1005(e)(2)(C)(i). The Act does not authorize this court to determine whether a status determination is arbitrary and capricious because, to use the petitioners' example, it is inconsistent with the status determination of another detainee who was detained under similar circumstances. If a preponderance of the evidence in the record—broadly understood to include the Government Information and not just the Government Evidence, plus any evidence submitted by the detainee or his Personal Representative—supports the Tribunal's finding, then the Tribunal's status determination must be upheld, provided, of course, the determination was otherwise made in accordance with the "standards and procedures specified by the Secretary of Defense." DTA § 1005(e)(2)(C)(i).

B. The Protective Order

Pursuant to the All Writs Act, 28 U.S.C. § 1651, which authorizes the court to issue "all writs necessary or appropriate in aid of [its] jurisdiction[]," we shall enter a protective order resolving the points in contention between the parties in such a way as to ensure the parties do not frustrate the court's ability to review a CSRT determination under the DTA. *Cf. Telecom. Research & Action Ctr. v. FCC*, 750 F.2d 70, 75-76 (D.C. Cir. 1984) (holding pursuant to All Writs Act that court of appeals "may resolve claims of unreasonable delay [by agency] in order to protect its future jurisdiction" to review final agency action). The order we enter, following an opportunity for the parties to suggest changes, will be the order proposed by the Government, as modified to conform to this opinion.

1. Counsel Access to Classified Information

The Government proposes to turn over to counsel for a petitioner only information that was presented to the CSRT and that "the Government has determined petitioners' counsel has a 'need to know,'" which in practice the Government anticipates will mean turning over all the Government Information with limited exceptions for information that pertains to anyone other than the detainee, highly sensitive information, and information pertaining to a highly sensitive source. Such highly sensitive information, which the Government represents will rarely be found and redacted, would be made available to the court ex parte and in camera in the event the detainee seeks judicial review of his status determination.

Petitioners' counsel, each of whom has a security clearance, contend they have a "need to know" all information about their clients' cases and related cases in order effectively to participate in the adversarial process of review in court. Petitioners argue that ex parte and in camera review of highly sensitive classified information, as the Government proposes, is not an adequate substitute for the judgment of counsel in identifying exculpatory evidence and evidence that the Tribunal, the Recorder, or the Personal Representative failed to comply with the procedures specified for the conduct of a CSRT.

We think it clear that this court cannot discharge its responsibility under the DTA, particularly its responsibility to determine whether a preponderance of the evidence supports the Tribunal's determination, unless a petitioner's counsel has access to as much as is practical of the classified information regarding his client. Coun-

sel simply cannot argue, nor can the court determine, whether a preponderance of the evidence supports the Tribunal's status determination without seeing all the evidence. Therefore, we presume counsel for a detainee has a "need to know" all Government Information concerning his client, not just the portions of the Government Information presented to the Tribunal.

That presumption is overcome to the extent the Government seeks to withhold from counsel highly sensitive information, or information pertaining to a highly sensitive source or to anyone other than the detainee but presents such evidence to the court ex parte and in camera. Therefore, as required in the Status Quo Order, except for good cause shown, the Government shall provide notice to counsel for the petitioners on the same day it files such information ex parte. The court does not require the Government to disclose such information to counsel because, consistent with our rule of deference, "[i]t is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role." *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 932 (D.C. Cir. 2003); *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003) ("Precisely because it is often difficult for a court to review the classification of national security information, '[w]e anticipate that in camera review of affidavits, followed if necessary by further judicial inquiry, will be the norm'").

The Government also proposes unilaterally to determine whether information is "protected," meaning that petitioners' counsel must keep it confidential and file

under seal any document containing such information. For example, the Government would designate as "protected" information "reasonably expected to increase the threat of injury or harm to any person" and information already designated by the Government to be "For Official Use Only" or "Law Enforcement Sensitive."

It is the court, not the Government, that has discretion to seal a judicial record, *cf. United States v. El-Sayegh*, 131 F.3d 158, 160 (D.C. Cir. 1997) ("The decision whether to seal a judicial record is . . . committed to the discretion of the district court"), which the public ordinarily has the right to inspect and copy, *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978). Therefore, insofar as a party seeks to file with the court nonclassified information the Government believes should be "protected," the Government must give the court a basis for withholding it from public view.

2. Counsel Access to Detainees

Both the Status Quo Order and the Government's Proposed Order define "legal mail" as correspondence between a detainee and his counsel with respect to subjects properly within the scope of counsel's representation. The parties do not disagree about the rules governing mail sent by a detainee to his counsel, but they do disagree about how mail from counsel to the detainee client should be handled and about the scope of counsel's representation under the DTA.

Under both proposed Orders, a Privilege Team composed of Department of Defense personnel would open an envelope labeled as legal mail and addressed to a detainee. Under the Status Quo Order, the Privilege Team would search legal mail only for contraband, such as

staples, paper clips, or other nonpaper items; under the Government's Proposed Order, however, legal mail would be searched for prohibited content, that is, anything outside the scope of the attorney's representation (of which more below). The Government's Proposed Order also would limit "legal mail" to:

> documents and drafts of documents that are intended for filing in this action and correspondence directly related to those documents that—
>
> i. are directly related to the litigation of this [DTA] action [and]
>
> ii. address only (a) those events leading up to this detainee's capture or (b) the conduct of the CSRT proceeding relating to this detainee[,]

thereby implicitly but effectively limiting the scope of counsel's representation to the DTA action. The Government's Proposed Order also would expressly prohibit counsel from communicating any information outside the scope of their representation.

The petitioners object to this regime, first pointing out that under the Status Quo Order, counsel have long been prohibited from telling a detainee about:

> ongoing or completed military intelligence, security, or law enforcement operations, investigations, or arrests . . . or current political events in any country that are not directly related to counsel's representation of that detainee.

Because their counsel have never breached this provision, the petitioners claim the Government does not need to screen for content any legal mail their counsel might send them. The Government responds that while

the Status Quo Order was in effect, some counsel—though the Government does not suggest counsel for the present petitioners—did use legal mail to inform their clients about prohibited subjects, including military operations in Iraq, terrorist attacks, Hezbollah's attack upon Israel, and the abuse at Abu Ghraib prison. The Government asserts such information can "incite detainees to violence" or cause "unrest," such as a riot, hunger strike, or suicide—as, indeed, it has done in the past.

At the least, the petitioners contend, counsel may legitimately represent the detainees in efforts to find alternate ways of ending their detention, including diplomatic means, and therefore must be able to correspond with the detainees regarding such alternatives; for example, they might want to correspond concerning which countries are suitable for seeking asylum. Using nonlegal mail is not a good alternative to using legal mail, they say, because it is very slow and heavily redacted. Moreover, the petitioners assert the attorney-client privilege, which is intended to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice," *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998) (internal quotation marks omitted), applies to the communications between counsel and the detainees.

Without expressing any view as to whether the attorney-client privilege applies in this context, we must agree that "full and frank communication" between a detainee and his counsel will help counsel present the detainee's case to the court, and thereby aid the process of review with which we have been charged by the Con-

gress. Regrettably, however, we cannot disagree with the Government that past breaches of the Status Quo Order by some counsel for detainees justify the Government's proposal to narrow the topics about which all counsel may correspond with a detainee and to hold all counsel accountable by screening the legal mail they send to their detainee clients.

Relatedly, we agree with the Government that the scope of representation authorized by the DTA is limited, in the words of the Act, to the pursuit of judicial review to "determine the validity of any final decision of a [CSRT]." We read the Government's proposal, however, to limit the content of the correspondence between petitioners and their counsel to "those events leading up to this detainee's capture" and the "conduct of the CSRT proceeding relating to this detainee," so as to include events occurring between the detainee's capture and his CSRT hearing, such as the claim of at least three of the Parhat Petitioners that they were told by military personnel as early as 2003 they would be released. This is necessary to enable counsel to follow such leads as his client can provide regarding exculpatory evidence that might be "reasonably available," but which the Recorder nonetheless failed to "obtain and examine."

In the protective order to be issued, we will include the Government's proposal to allow a Privilege Team, composed of personnel from the Department of Defense, to review legal mail in order to ensure counsel's correspondence does not include content outside the scope of the previous paragraph. The proposed procedure protects the confidentiality of communications between counsel and the detainee by providing that the Privilege Team may not disclose the content of a communication

to anyone unless counsel for a detainee seeks court intervention to prevent the Privilege Team from screening or redacting information sent to the detainee, in which event the Privilege Team "may disclose the material at issue to a Special Litigation Team [in the Department of Justice and] . . . to the Commander [at Guantánamo] or his representatives, including attorneys for the Government." The Special Litigation Team, none of whose members may litigate the merits of a petition brought by a detainee, represents the Privilege Team in any dispute over screened or redacted information.

3. Attorney Access to Prospective Clients

The Government refuses to give counsel access to classified information or to the legal mail system until counsel provides "written evidence" that a detainee has personally authorized counsel to represent him, even when a next friend purports to act on behalf of a detainee. To that end, the Government proposes to allow a lawyer one visit to Guantánamo to meet with a potential detainee client for up to a total of eight hours in which to obtain the detainee's authorization to pursue a petition for review of the detainee's status determination. The Government asserts the eight-hour limit is needed to prevent an "unwieldy and unworkable situation," apparently referring to the burden upon the base administration of accommodating numerous visits by lawyers to meet with potential clients.

The Government believes a detainee's personal authorization is "strongly [to be] preferred" because a putative next friend probably does not satisfy the requirements for standing. *See Whitmore v. Arkansas*, 495 U.S. 149, 163, 165, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990) (holding in habeas action "next friend" who is

"truly dedicated to the best interests of the person on whose behalf he seeks to litigate" has standing to act on behalf of prisoner who is "unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability"). For one thing, each detainee has been notified of his right to seek review under the DTA. In addition, some detainees, according to the Government, "revel in their status as enemies of the United States" and should be allowed to choose not to participate in a DTA action.

The petitioners' counsel object to the eight-hour limit upon their effort to persuade a detainee to pursue an action under the DTA because, they say, the detainees are so distrustful that it can take longer than that to persuade one to engage counsel. They propose that a lawyer be allowed to visit a detainee as a potential client twice, for an unspecified period of time, as has been allowed until now under the Status Quo Order.

We conclude the requirement of the Status Quo Order that a lawyer "provide evidence of . . . authority to represent the detainee . . . after the conclusion of a second visit with the detainee" is reasonable in that it allows the lawyer time to earn the detainee's trust and to discuss whether the detainee wants to file a petition for judicial review. The Government has not shown that two visits rather than one will harm its interests or overburden its resources. On the contrary, the Government itself has allowed that a detainee represented by counsel should not be limited to three visits with retained counsel—as the Government had first proposed in this case—because, based upon an evaluation of the "resources and needs at Guantanamo" by Rear Admiral Harry B. Harris, Commander of the Joint Task Force-Guantánamo,

the Government determined such a limitation "is no longer warranted." Though the Government asserts its proposed one visit/eight-hour limitation upon meetings between a lawyer and a potential client is still "warranted and appropriate in light of the operations" at Guantánamo, it has made no showing that a lawyer's additional visit to see a potential client imposes any greater burden upon it than does a lawyer's additional visit to a client he or she already represents.

Counsel for Bismullah, who represent Bismullah's putative next friend, maintain they need present only "evidence of . . . authority to represent the detainee," rather than the Government's proposed consent form bearing the detainee's signature. They argue that requiring counsel to produce evidence both that a detainee authorizes counsel to act on his behalf and that he authorizes the filing of a petition submitted by a detainee's next friend would, in effect, "eliminate next friend cases" by requiring "that each next friend action become a direct action."

In *Whitmore*, the Supreme Court concluded that the Congress, in enacting 28 U.S.C. § 2242 ("Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf"), had codified the historic practice of allowing a "next friend" to file a petition for habeas corpus on behalf of a prisoner. 495 U.S. at 162-63, 110 S. Ct. 1717. Therefore, when the Congress later authorized this court to review the status determination of a CSRT upon the basis of a claim brought "by or on behalf of an alien [detainee]," DTA § 1005(e)(2)(B), we understand it to have permitted a next friend to petition for review of a CSRT determination when the de-

tainee is "unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability." *Whitmore*, 495 U.S. at 165, 110 S. Ct. 1717. Hence, we reject the Government's proposal to require a detainee personally to authorize a next friend to act on his behalf when a petitioner asserting next friend standing can demonstrate the detainee is under such a disability. After two visits between a lawyer and a detainee, either the lawyer should be able to obtain the detainee's express authorization to represent him in a DTA action or the would-be next friend should be able to obtain, through the lawyer, evidence of the detainee's disability and best interests sufficient to perfect the next friend's standing. *See id.* We reject the Government's proposal to require that the detainee sign a form authorizing the filing of the petition submitted by a putative next friend; the inquiry into whether a would-be next friend has standing is necessarily a matter to be determined case by case.

4. Miscellaneous

We do not believe it necessary to appoint a special master to hold hearings, order discovery, or make factual findings because we have resolved the pending procedural disputes between the parties. We therefore deny without prejudice the petitioners' motion to appoint a special master.

The Government's motion that the court consider separately the claims jointly filed by the seven detainee petitioners in *Parhat v. Gates* is granted. In order to evaluate the merits of each Parhat Petitioner's claims, we must review a separate record of that petitioner's status determination. Accordingly, each Parhat Petitioner will be assigned a separate case number and each

case will be separately briefed and assigned to a merits panel, absent further order of this court, *see Handbook of Practice and Internal Procedures, United States Court of Appeals for the District of Columbia Circuit* §§ V.A. ("[C]ases involving . . . the same, similar, or related issues, may be consolidated"), III.H. (2007); Fed R. App. P. 3(b).

III. Conclusion

We conclude the record on review consists of the Government Information, that is, all "reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant." We grant in part and deny in part, as explained in this opinion, both the petitioners' and the Government's motions for a protective order; deny without prejudice the petitioners' motions for discovery and for the appointment of a special master; and grant the Government's motion separately to consider the claims brought by each of the petitioners in *Parhat v. Gates,* No. 06-1397.

The Clerk of the Court will enter in each of these cases a Protective Order consistent with the foregoing opinion and assign a separate docket number to each Parhat Petitioner.

So ordered.

ROGERS, Circuit Judge, concurring:

Today the court sets forth the procedures to be applied in actions under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Div. A, tit. X, 119 Stat. 2739 ("DTA") by detainees who wish to challenge the classification decision of a Combatant Status Review Tribunal

("CSRT"). I offer two observations that emphasize the unique nature of DTA actions.

First, the court sets two limitations on the attorney-client relationship. For reasons of national security, the court authorizes the inspection of legal mail. Op. at 180, 189-90. That mail, in turn, is restricted in substance to matters "directly related" to this court's limited scope of review under the DTA. DTA § 1005(e)(2)(C); *see* 28 U.S.C. § 2241(e)(2); Op. at 189-90. Ordinarily, legal mail is not screened for content by federal prison officials, *see* 28 C.F.R. §§ 540.18, 540.19, and a prison warden "may not ask the attorney to state the subject matter of [an] . . . interview," *id.* § 543.13(d). However, the posture of these cases and the questionable applicability of constitutional norms, *see Boumediene v. Bush*, 476 F.3d 981, 1011 (D.C. Cir.) (Rogers, J., dissenting), *cert. granted*, —U.S.—, 127 S. Ct. 3078, ___ L. Ed. 2d 755 (2007), add complexities. The attorney-client privilege has a common-law basis, *see, e.g., In re Lindsey*, 158 F.3d 1263, 1266 (D.C. Cir. 1998) (per curiam), but the Constitution has been used in various cases to enforce attorney access. *See, e.g., Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995); *Bieregu v. Reno*, 59 F.3d 1445, 1459 (3d Cir. 1995); *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985); *United States v. Noriega*, 752 F. Supp. 1032, 1033 (S.D. Fla. 1990). Regardless, zealous advocacy is needed in order to inform the court and to carry out Congress's grant of review in the DTA. The court has adopted a pragmatic balance of the needs of the court and the needs of national security as determined by the Executive, to whom the court defers. *See* Op. at 187-88; *see also id.* at 189-90. However, nothing in the opinion would foreclose restoration of the full attorney-client relationship were the Executive to deter-

mine that national security no longer requires such restrictions in DTA actions or were the detainees to be in a position to invoke the jurisdiction of this court beyond the limited scope of the DTA.

Second, the court has defined the scope of the record in terms of the plain text of the DTA and the Department of Defense's CSRT procedures. *See* Op. at 185-86. Because the court's review is for "a preponderance of the evidence," DTA § 1005(e)(2)(C)(i), the record before this court will consist of "all the information a [CSRT] is authorized to obtain and consider, pursuant to the procedures specified by the Secretary of Defense," Op. at 180. To the extent this court's DTA powers are intended to check the substance of CSRT determinations, the CSRT record for review will be only a partial record. It is incomplete for at least two reasons—and possibly a third.

1. Although a detainee has the power to request the consideration of evidence he may have on-hand and testimony of "reasonably available" witnesses, he must develop this rebuttal without knowledge of the classified information that forms the case against him. He also must do so without the benefit of counsel. Nonetheless, the detainee bears the burden of proving that he is not an "enemy combatant," a term that has proven to have an elastic nature. *See Boumediene*, 476 F.3d at 1011 n.14 (Rogers, J., dissenting); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 468-72, 474-75 (D.D.C. 2005).

2. The "Government Information" consists only of "such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an

enemy combatant." Op. at 180 (quoting Memorandum from Gordon England, Secretary of the Navy, Regarding Implementation of CSRT Procedures for Enemy Combatants at Guantanamo Bay Naval Base, Cuba, encl. 1, § E(3) (hereinafter CSRT Procedures)); *cf.* Protective Order § 2.I. Thus, the initial record is limited by unilateral decisions of the Executive. If there are documents in the possession of the U.S. Government that were not gathered by the Recorder and considered by the CSRT, then the only recourse for a detainee is to seek the documents from the Executive as part of the DTA action and, upon obtaining them, to seek a new CSRT. Disputes about what qualifies as "reasonably available," already a key point of contention, *see, e.g.*, Bismullah Petition for Release and Other Relief ¶¶ 165-68, 175; Pet'rs' Joint Br. in Support of Pending Motions at 23, cannot be decided today.

3. The gap between Congress's aspirations for the DTA and the Executive's implementation of the CSRT procedures for compiling the record, which has come to light during briefing in this case, presents new questions that also cannot be resolved today. The Executive initially asserted a curious entitlement to a "strong presumption of regularity" much as is received by an administrative agency subject to the requirements of the Administrative Procedure Act. *See* Corrected Br. of Resp'ts Addressing Pending Preliminary Motions at 66-68; Op. at 185-86. Then, in a post-argument submission of June 1, 2007, offering to "assist the Court in understanding the process of developing the CSRT record," the Executive acknowledged that it has not utilized the procedure for compiling the CSRT record that the Department of Defense specified in its publicly-announced procedures for conducting CSRTs. *See* Mot. for Leave

to File Decl. Describing Process of Compiling CSRT Record (June 1, 2007); Decl. of Rear Admiral (Retired) James M. McGarrah (May 31, 2007).[1] In particular, "due to the other extensive responsibilities of the Recorder," McGarrah Decl. ¶ 4, since September 1, 2004, the Department of Defense has construed its own requirement that "the Recorder shall obtain and examine the Government Information," CSRT Procedures encl. 2, § C(1), to permit the evidence to be sorted and assessed not by the Recorder, who must be "a commissioned officer serving in the grade of O-3 or above, preferably a judge advocate, appointed by the Director, CSRT," *id.* encl. 1, § C(2), but rather by a "Case Writer," who "received approximately two weeks of training," McGarrah Decl. ¶ 5.

Inasmuch as the DTA was designed to "legitimiz[e], through congressional action, what the Administration has done at Guantanamo Bay," 151 Cong. Rec. S11073 (Oct. 5, 2005) (statement of Sen. Graham), the Executive's belated revelation regarding the record used for CSRT proceedings is unsettling. As relevant, it leaves undetermined whether the court will be in a position to conduct the substantive evaluation, as the DTA directs, of whether a challenged CSRT determination is supported by a preponderance of the evidence, *see* DTA § 1005(e)(2)(C)(i). The Executive has previously argued to this court that the CSRT process in the DTA was designed as an adequate replacement for the writ of ha-

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[1] *See also* Pet'rs' Joint Mot. for Leave to File Decl. of Lt. Col. Ste[ph]en Abraham (June 22, 2007); Decl. of Stephen Abraham (June 15, 2007) (attesting to command influence and departures from procedures in compiling CSRT records).

beas corpus, *see* Supplemental Br. of the Federal Parties Addressing the Detainee Treatment Act of 2005, at 49-53, *Boumediene v. Bush*, 476 F.3d 981 (2007). Revelations that evidence is summarized by an anonymous "research, collection, and coordination team," McGarrah Decl. ¶ 4, whose activities have left "some of the[ ] electronic files . . . corrupted," *id.* ¶ 16, reinforce concerns about the adequacy of actions under the DTA as a substitute for the writ of habeas corpus. *See Boumediene*, 476 F.3d at 1004-07 (Rogers, J., dissenting).

PROTECTIVE ORDER

This matter comes before the court upon the parties' motions for a protective order to prevent the unauthorized disclosure or dissemination of classified national security information and other protected information that may be reviewed by, made available to, or is otherwise in the possession of, the Petitioner or Petitioner's Counsel in this case, and upon the Government's motion to amend the initial Protective Order. Pursuant to the general supervisory authority of the court, and for good cause shown,

IT IS ORDERED:

1. General Provisions

A. The court finds that this case involves classified national security information or documents, the storage, handling and control of which require special security precautions, and access to which requires a security clearance and a "need to know." This case may also involve other protected information or documents, the storage, handling and control of which may require special precautions in order to protect

the security of United States personnel and facilities, and other significant interests.

B. The purpose of this Protective Order is to establish the procedures that must be followed by a Petitioner, Petitioner's Counsel, and all other individuals who receive access to classified information or documents, or other protected information or documents, in connection with this case, including the Department of Defense (DoD) Privilege Team.

C. The procedures set forth in this Protective Order will apply to all aspects of this case, and may be modified by further order of the court sua sponte or upon application by any party. The court will retain continuing jurisdiction to enforce or modify the terms of this Order.

D. Nothing in this Order is intended to or does preclude the use of classified information by the Government as otherwise authorized by law outside of this action under the Detainee Treatment Act.

E. Petitioner's Counsel of record is responsible for advising his or her partners, associates, and employees, the Petitioner, and others of the contents of this Protective Order, as appropriate or needed.

F. All documents marked as classified, and information contained therein, remain classified unless the documents bear a clear indication that they have been declassified or determined to be unclassified by the agency or department that is the original classification authority of the document or of the information contained therein.

G. Any violation of this Protective Order may result in a sanction for contempt.

2. **Designation of Court Security Officer**

The court designates Christine E. Gunning as Court Security Officer ("CSO") for these cases, and Jennifer H. Campbell, Erin E. Hogarty, Joan B. Kennedy, Charline A. DaSilva, Nathaniel A. Johnson, Daniel O. Hartenstine, Michael P. Macisso, James P. Londergan, Barbara J. Russell and Miguel A. Ferrer as Alternate CSOs, for the purpose of providing security arrangements necessary to protect from unauthorized disclosure any classified documents or information, or protected documents or information, to be made available in connection with these cases. Petitioners' Counsel must seek guidance from the CSO with regard to appropriate storage, handling, transmittal, and use of classified documents or information.

3. **Definitions**

A. "Detainee" means an alien detained by the DoD as an alleged enemy combatant at the U.S. Naval Base at Guantánamo Bay, Cuba.

B. "Petitioner" means a Detainee or a "next friend" acting on his behalf.

C. "Petitioner's Counsel" includes a lawyer who is employed or retained by or on behalf of a Detainee for purposes of representing the Detainee in this litigation, as well as co-counsel, interpreters, translators, paralegals, investigators, and all other personnel or support staff employed or engaged to assist in this litigation.

D. As used herein, the words "documents" and "information" include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, conforming copies and non-conforming copies (whether different from the original by reason of notation made on such copies or otherwise), and further include, but are not limited to:

i. papers, correspondence, memoranda, notes, letters, reports, summaries, photographs, maps, charts, graphs, interoffice and intraoffice communications, notations of any sort concerning conversations, meetings, or other communications, bulletins, teletypes, telegrams, telefacsimiles, invoices, worksheets; and drafts, alterations, modifications, changes and amendments of any kind thereto;

ii. graphic or oral records or representations of any kind, including, but not limited to, photographs, charts, graphs, microfiche, microfilm, videotapes, sound recordings of any kind, and motion pictures;

iii. electronic, mechanical or electric records of any kind, including, but not limited to, tapes, cassettes, disks, recordings, electronic mail, films, typewriter ribbons, word processing or other computer tapes or disks, and all manner of electronic data processing storage; and

iv. information acquired orally.

E. The terms "classified documents" and "classified information" refer to:

i. any document or information that has been classified by any Executive Branch agency in the interests of national security or pursuant to Executive

Order, including Executive Order 12958, as amended, or its predecessor Orders, as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI)," or any classified information contained in such document;

ii. any document or information, regardless of its physical characteristics, now or formerly in the possession of a private party that has been derived from United States Government information that was classified, regardless of whether such document or information has subsequently been classified by the Government pursuant to Executive Order, including Executive Order 12958, as amended, or its predecessor Orders, as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI)";

iii. oral or nondocumentary classified information known to the Petitioner or Petitioner's Counsel; or

iv. any document or information as to which the Petitioner or Petitioner's Counsel has been notified orally or in writing that such document or information contains classified information.

F. The terms "protected documents" and "protected information" refer to any document or information deemed by the court, either upon application by the Government or sua sponte, to require special precautions in storage, handling, and control, in order to protect the security of United States Government personnel or facilities, or other significant government interests.

G. "Access to classified information" and "access to protected information" mean having access to, reviewing, reading, learning, or otherwise coming to know in any manner any classified information or protected information.

F. "Communication" means all forms of communication between Petitioner's Counsel and a Detainee, including oral, written, electronic, or by any other means.

I. "Legal Mail" consists only of documents and drafts of documents that are intended for filing in this action and correspondence directly related to those documents that—

i. relate directly to the litigation of this action;

ii address only (a) events leading up to the capture of the Detainee on whose behalf the petition in this action was filed, (b) events occurring between such Detainee's capture and any hearing before a Combatant Status Review Tribunal (CSRT) relating to such Detainee, and (c) the conduct of the CSRT proceeding relating to such Detainee; and

iii. do not include any of the following information, in any form, unless directly related to the litigation of this action:

a. information relating to any ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency;

b. information relating to current political events in any country;

c. information relating to security procedures at the Guantánamo Naval Base (including names of United States Government personnel and the layout of camp facilities) or the status of other Detainees;

d. publications, articles, reports, or other such material including newspaper and other media articles, pamphlets, brochures, and publications by nongovernmental or advocacy organizations, or any descriptions of such material.

J. The "Record on Review" means the information defined as "Government Information" by the Secretary of the Navy in his memorandum regarding "Implementation of Combatant Status Review Tribunal Procedures" dated July 29, 2004, to wit, all "reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant."

K. "Secure area" means a physical facility accredited or approved for the storage, handling, and control of classified information.

4. Roles and Functions of the DoD Privilege Team and Special Litigation Team

A. The "DoD Privilege Team" comprises one or more DoD attorneys and one or more intelligence or law enforcement personnel. If required, the DoD Privilege Team may include interpreters/translators. The DoD Privilege Team is charged with representing and protecting the interests of the United States Government related to security and threat information. The DoD Privilege Team is authorized to re-

view all communications specified in this order, including written communications and other materials sent from Petitioner's Counsel to the Detainee. The DoD Privilege Team may not disclose a communication from Petitioner's Counsel to the Detainee other than information provided in a filing with the court and served on Government counsel, unless the disclosure of such information is authorized by this or another order of the court or by Petitioner's Counsel.

B. The DoD Privilege Team may redact or screen out material not meeting the definition of "Legal Mail" in section 3(I) above.

C. When the DoD Privilege Team proposes to redact or screen out material sent from Petitioner's Counsel to a Detainee, Petitioner's Counsel for that Detainee must be notified.

D. In the event a dispute regarding the screening and redaction of material from legal mail sent from Petitioner's Counsel to a Detainee cannot be resolved by the parties and Petitioner's Counsel seeks the intervention of this court, the DoD Privilege Team may disclose the material at issue to the Commander, JTF—Guantánamo Naval Base, or his representatives, including counsel for the Government.

E. "Special Litigation Team" is authorized to represent the DoD Privilege Team with respect to execution of its duties. The Special Litigation Team will be composed of one or more attorneys from the Department of Justice, who may not take part or be involved in litigating the merits of this action under the Detainee Treatment Act or any other case brought by or against the Detainee.

F. The DoD Privilege Team may, through the Special Litigation Team (see § 4(H) below), inform the court of any issues or problems related to the release or processing of information related to this case.

G. The Special Litigation Team may not disclose information provided by the DoD Privilege Team or any information submitted by Petitioner's Counsel to the DoD Privilege Team for review, except as provided by this Order or as permitted by Petitioner's Counsel or by the court.

H. Petitioner's Counsel or the Special Litigation Team may submit filings to the court concerning the DoD Privilege Team or actions taken by it.

I. Until otherwise notified, potentially privileged information in such filings must be submitted to the court under seal and contain a conspicuous notation as follows: "Submitted Under Seal—Contains Privileged Information." To maintain such information under seal, an appropriate application must be made to the court. Such information must be maintained under seal unless and until the court determines the information should not be sealed. Such filings by Petitioner's Counsel or the Special Litigation Team may not be served on counsel for respondent, except as authorized by Petitioner's Counsel or the court. With respect to a submission made under seal, a redacted version suitable for filing in the public record must be provided. Unresolved disputes concerning such redacted versions may be presented to the court.

J. Petitioner's Counsel may not convey to a Detainee information redacted or screened by the DoD Privi-

lege Team or designated for such redaction or screening, absent consent from the DoD Privilege Team, the Special Litigation Team, or the Government, or authorization by this court.

5. Access to Classified Information and Documents

A. Without authorization from the Government, neither Petitioner nor Petitioner's Counsel may have access to any classified information involved in this case.

B. Petitioner's Counsel is presumed to have a "need to know" all the information in the Government's possession concerning the Detainee he represents. This presumption is overcome to the extent the Government seeks to withhold from Petitioner's Counsel highly sensitive information or information concerning a highly sensitive source that the Government presents to the court ex parte and in camera. Except for good cause shown, the Government must provide notice to Petitioner's Counsel on the same day it files such information with the court ex parte.

C. Petitioner's Counsel to be provided access to classified information must execute the Memorandum of Understanding ("MOU") appended to this Protective Order, file executed originals with the court, and submit copies to the CSO and counsel for the Government. The execution and submission of the MOU is a condition precedent for Petitioner's Counsel to have initial and continuing access to classified information for the purposes of this proceeding.

D. The substitution, departure, or removal of Petitioner's Counsel from these cases for any reason will not release that person from the provisions of this

Protective Order or the MOU executed in connection with this Order.

E. Authorization from the Government to access classified information will not be granted to Petitioner's Counsel unless Petitioner's Counsel has first:

i. received the necessary security clearance as determined by the Department of Justice;

ii. obtained either (a) written evidence of authority to represent the Detainee or (b) evidence of authority to represent the Detainee through the Detainee's next friend; and

iii. signed the MOU attached hereto as Exhibit A, agreeing to comply with the terms of this Protective Order.

F. Prospective counsel for a Detainee may have up to two visits with a Detainee to obtain his authorization to seek review of the CSRT's determination of his status.

G. The substitution, departure, or removal of Petitioner's Counsel from this case for any reason will not release that person from the provisions of this Protective Order.

H. Except as provided herein, Petitioner's Counsel may not disclose any classified or protected information to any person. Petitioner's Counsel may not disclose classified or protected information to a Detainee, unless that information was obtained in the first instance from the Detainee.

I. disclosure of classified information includes any knowing, willful, or negligent action that could rea-

sonably be expected to result in a communication or physical transfer of classified information.

J. Neither Petitioner nor Petitioner's Counsel may disclose or cause to be disclosed in connection with this case any information known or believed to be classified except as otherwise provided herein.

K. At no time, including anytime subsequent to the conclusion of this case, may Petitioner's Counsel make any public or private statements disclosing any classified information made available pursuant to this Protective Order, including the fact that any such information is classified.

L. Petitioner's Counsel is required to treat all information learned from a Detainee, including any oral or written communication with a Detainee, as classified information, unless and until the information is submitted to the DoD Privilege Team or counsel for the Government and determined to be nonclassified. All classified material must be handled, transported, and stored in a secure manner, as provided by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information Security Supplement to DOD Regulation 5200.1R.

M. Petitioner's Counsel or the DoD Privilege Team must disclose to Government counsel or Commander, JTF—Guantánamo Naval Base, any information learned from a Detainee involving any future event that threatens national security or is likely to involve violence. In such case, the Privilege Team must provide contemporaneous notice to Petitioner's Counsel and retain for Petitioner's Counsel a copy of the ma-

terial provided to Government counsel or Commander, JTF—Guantánamo Naval Base.

N. Petitioner's Counsel may not disclose the contents of any classified documents or information to any person, except those authorized pursuant to this Protective Order, the court, and counsel for the Government with the appropriate clearances and the need to know that information.

O. In the event that classified information enters the public domain, counsel is not precluded from making private or public statements about the information already in the public domain, but only where the statements are not subject to the limitation set forth below. Counsel may not make any public or private statements revealing personal knowledge from non-public sources regarding the classified or protected status of the information or disclosing that counsel had personal access to classified or protected information confirming, contradicting, or otherwise relating to the information already in the public domain. In an abundance of caution and to help ensure clarity on this matter, the court emphasizes that counsel must not be the source of any classified or protected information entering the public domain.

P. The foregoing does not prohibit Petitioner's Counsel from citing or repeating information in the public domain that Petitioner's Counsel does not know or have reason to believe to be classified information or a classified document, or derived from classified information or a classified document.

6. Secure Storage of Classified Information

A. The CSO will arrange for one appropriately secure area for the use of Petitioner's Counsel. The secure area must contain a working area that will be supplied with secure office equipment reasonable and necessary to the preparation of the Petitioner's case. Expenses for the secure area and its equipment will be borne by the Government.

B. The CSO will establish procedures to ensure that the secure area is accessible to Petitioner's Counsel during normal business hours and at other times on reasonable request as approved by the CSO. The CSO will establish procedures to ensure that the secure area may be maintained and operated in the most efficient manner consistent with the protection of classified information. The CSO or CSO designee may place reasonable and necessary restrictions on the schedule of use of the secure area in order to accommodate appropriate access to all Petitioners' Counsel in this and other proceedings.

C. All classified information provided by the Government to Petitioner's Counsel, and all classified information otherwise possessed or maintained by Petitioner's Counsel, must be stored, maintained, and used only in the secure area.

D. No documents containing classified information may be removed from the secure area unless authorized by the CSO or CSO designee supervising the area.

E. Consistent with other provisions of this Protective Order, Petitioner's Counsel will have access to the classified information made available to him or her in

the secure area and be allowed to take notes and prepare documents with respect to those materials.

F. Petitioner's Counsel may not copy or reproduce any classified information in any form, except with the approval of the CSO or in accordance with the procedures established by the CSO for the operation of the secure area.

G. All documents prepared by Petitioner's Counsel that do or may contain classified information (including without limitation notes taken and memoranda prepared by counsel and pleadings and other documents intended for filing with the court) must be transcribed, recorded, typed, duplicated, copied, and otherwise prepared only by persons who have received an appropriate approval for access to classified information. Such activities must take place in the secure area on approved word processing equipment and in accordance with the procedures approved by the CSO. All such documents and any associated materials containing classified information (such as notes, memoranda, drafts, copies, typewriter ribbons, magnetic recordings, exhibits) must be maintained in the secure area unless and until the CSO advises that those documents or associated materials are unclassified in their entirety. None of these materials may be disclosed to counsel for the Government unless authorized by the court, by Petitioner's Counsel, or as otherwise provided in this Protective Order.

H. Petitioner's Counsel may discuss classified information only within the secure area or in another area authorized by the CSO, may not discuss classified information over any standard commercial telephone

instrument or office intercommunication system, and may not transmit or discuss classified information in electronic mail communications of any kind.

I. The CSO or CSO designee may not reveal to any person the content of any conversations she or he may hear by or among Petitioners' Counsel, nor reveal the nature of documents being reviewed by them, or the work generated by them, except as necessary to report violations of this Protective Order to the court or to carry out their duties pursuant to this Order. In addition, the presence of the CSO or CSO designee will not operate as a waiver of, limit, or otherwise render inapplicable the attorney-client privilege or work product protections.

J. All documents containing classified information prepared, possessed or maintained by, or provided to, Petitioner's Counsel (except filings submitted to the court and served on counsel for the Government), must remain at all times in the control of the CSO for the duration of these cases.

K. As stated in more detail in Section 9 below, failure to comply with these rules may result in the revocation of counsel's security clearance, civil liability, criminal liability, or any combination thereof.

7. Access to Protected Information

A. The Government may apply to the court to deem any information "protected," and if filed in this court to be maintained under seal. Such information must be maintained under seal unless and until the court determines the information should not be designated as "protected."

B. Without authorization from the Government or the court, protected information may not be disclosed or distributed to any person or entity other than the following:

i. Petitioner's Counsel and counsel bound by the terms of this protective order in a case filed on behalf of another Detainee seeking review under the Detainee Treatment Act,

ii. the court and its support personnel, and

iii. a Detainee if the information was obtained in the first instance from the Detainee.

C. Neither Petitioner nor Petitioner's Counsel may disclose or cause to be disclosed any information known or believed to be protected in connection with any hearing or proceeding in this case except as otherwise provided herein.

D. At no time, including any period subsequent to the conclusion of the proceedings, may Petitioner's Counsel make any public or private statements disclosing any protected information made available pursuant to this Protective Order, including the fact that any such information is protected.

E. Protected information may be used only for purposes directly related to this case and not for any other litigation or proceeding, except by leave of the court. Photocopies of documents containing such information may be made only to the extent necessary to facilitate the permitted use hereunder.

F. Nothing in this Protective Order prevents the Government from using for any purpose protected information it provides to a party. Nothing in this Protec-

tive Order entitles a nonparty to this case to protected information.

G. Within ninety (90) days of the resolution of this action and the termination of any certiorari review therefrom, all protected documents and information, and any copies thereof, provided to Petitioner's Counsel must be promptly destroyed and Petitioner's Counsel must certify in writing that all designated documents and materials have been destroyed. Counsel for the Government may retain one complete set of any such materials that were presented in any form to the court. Any such retained materials must be placed in an envelope or envelopes marked "Protected Information Subject to Protective Order." In any subsequent or collateral proceeding, a party may seek discovery of such materials from the Government, without prejudice to the Government's right to oppose such discovery or its ability to dispose of the materials pursuant to its general document retention policies.

H. The Record on Review must be provided to Petitioner's Counsel at the time the certified index of the record is filed in this court or as otherwise ordered by the court.

8. **Procedures for Filing Documents**

A. Until further order of this court, any pleading or other document filed by Petitioner that Petitioner's Counsel does not believe contains classified information must be marked "Pending Classification Review," filed directly with the court, and immediately served upon Government counsel. Government counsel must accept service via hand or overnight mail.

Counsel for the Government must promptly examine the pleading or other document and forward it to the appropriate agencies for their determination whether the pleading or other document contains classified information. The court will secure the document until such a determination is rendered. If it is determined that the pleading or other document does not contain classified information, Government counsel will promptly so notify the court and Petitioner's Counsel. Should a determination be made that the pleading or other document contains classified information, Government counsel will immediately notify the court of the determination so that the document may be filed under seal and maintained appropriately. Government counsel will also notify Petitioner's Counsel and the CSO. The CSO will work with Petitioner's Counsel to ensure that any classified information that may have been inadvertently processed outside of the secure facility is appropriately secured. Government counsel will work with the appropriate government agencies and departments to prepare a redacted version of the pleading or other document appropriate for filing on the public record.

B. Any pleading or other document filed by Petitioner that Petitioner's Counsel knows to be classified, believes may be classified, or is unsure of the proper classification, must be filed under seal with the CSO at the secure facility. The pleading or other document must be marked "secret" or "top secret" as appropriate. Petitioner's Counsel will provide the original pleading and six copies thereof to the CSO. The date and time of physical submission to the CSO will

be considered the date and time of filing. The CSO must immediately email the court's Guantanamo Notification List that a filing has been received. The CSO will then deliver to the court and counsel for the Government any pleading or other document filed by Petitioner that contains classified or presumptively classified information. The CSO must promptly examine the pleading or other document and forward it to the appropriate government agencies and departments for their determination as to whether the pleading or other document contains classified information. If it is determined that the pleading or other document contains classified information, the CSO must ensure that the document is marked with the appropriate classification marking and that the document remains under seal. Government counsel will work with the appropriate government agencies or departments to prepare a redacted version of the pleading or other document appropriate for filing on the public record. If it is determined that the pleading or other document does not contain classified information, Government counsel will promptly so notify the court and Petitioner's Counsel, and the Clerk will direct the parties to file a public version without any classification markings. Any deliberate mishandling of classified information could result in the revocation of counsel's security clearance, sanction by the court, or both.

C. Any pleading or other document filed by the Government containing classified information must be filed under seal with the court through the CSO. The date and time of physical submission to the CSO will be considered the date and time of filing with the court.

The CSO must serve a copy of any classified pleadings by the Government upon the Petitioner at the secure facility.

9. Penalties for Unauthorized Disclosure

A. Any disclosure of classified information in violation of this order may constitute violations of United States criminal laws. In addition, any violation of the terms of this Protective Order must be immediately brought to the attention of the court and may result in a charge of contempt of court and possible referral for criminal prosecution. *See, e.g.,* Executive Order 12958, as amended. Any breach of this Protective Order may also result in the termination of access to classified information and protected information. Persons subject to this Protective Order are advised that direct or indirect unauthorized disclosure, retention, or negligent handling of classified documents or information could cause damage to the national security of the United States and may be used to the advantage of an adversary of the United States or against the interests of the United States. Persons subject to this Protective Order are also advised that direct or indirect unauthorized disclosure, retention, or negligent handling of protected documents or information could risk the security of United States Government personnel, United States Government facilities, and other significant United States Government interests. This Protective Order is to ensure that those authorized to receive classified information or protected information will not divulge this information to anyone who is not authorized to receive it, without prior written authoriza-

tion from the original classification authority and in conformity with this Protective Order.

B. The termination of these proceedings will not relieve any person or party provided classified information or protected information of his, her, or its obligations under this Protective Order.

Exhibit A

MEMORANDUM OF UNDERSTANDING REGARDING ACCESS TO CLASSIFIED NATIONAL SECURITY INFORMATION

Having familiarized myself with the applicable statutes, regulations, and orders related to, but not limited to, unauthorized disclosure of classified information, espionage and related offenses; The Intelligence Identities Protection Act, 50 U.S.C. § 421; 18 U.S.C. § 641; 50 U.S.C. § 783; 28 C.F.R. § 17 et seq.; and Executive Order 12958, I understand that I may be the recipient of information or documents that belong to the United States and concern the present and future security of the United States, and that such documents and information together with the methods and sources of collecting it are classified by the United States Government. In consideration for the disclosure of classified information or documents:

(1) I agree that I will never divulge, publish, or reveal either by word, conduct, or any other means such classified documents and information unless specifically authorized in writing to do so by an authorized representative of the United States Government, or as expressly authorized by the Protective Order entered in the case captioned _____ __.

(2) I agree that this Memorandum of Understanding and any other non-disclosure agreement signed by me will remain forever binding on me.

(3) I have received, read, and understand the Protective Order entered by the court in the case captioned _____, and I agree to comply with the provisions thereof.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 06-1197, 06-1397

HAJI BISMULLAH A/K/A HAJI BISMILLAH, AND A/K/A HAJI BESMELLA

HAJI MOHAMMAD WALI, NEXT FRIEND OF HAJI BISMULLAH, PETITIONERS

v.

ROBERT M. GATES, SECRETARY OF DEFENSE, RESPONDENT

HUZAIFA PARHAT, ET AL. PETITIONERS

v.

ROBERT M. GATES, SECRETARY OF DEFENSE, ET AL., RESPONDENTS

Oct. 3, 2007

Before: GINSBURG, Chief Judge, and HENDERSON and ROGERS, Circuit Judges.

Opinion for the Court filed by Chief Judge GINSBURG.

GINSBURG, Chief Judge:

The petitioners are eight men detained at the Naval Station at Guantánamo Bay, Cuba. Each petitioner seeks review under the Detainee Treatment Act (DTA), Pub. L. No. 109-148, § 1005(e)(2), 119 Stat. 2742-43 (Dec. 30, 2005), of the determination by a Combatant Status Review Tribunal (CSRT or Tribunal) that he is an "enemy combatant." In our opinion of July 20, 2007, we addressed various procedural motions filed by the Government and the petitioners to govern our review of the merits of the detainees' petitions. *Bismullah v. Gates (Bismullah I)*, 501 F.3d 178 (D.C. Cir. 2007). The Government then petitioned for rehearing or, in the alternative, suggested rehearing en banc. The petition for rehearing addresses two distinct aspects of *Bismullah I*: the scope of the record on review before the court; and the extent to which the Government must disclose that record to the petitioners' counsel.[1] We deny the Government's petition for rehearing for the reasons discussed below.

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[1] In support of its petition for rehearing, the Government attached the unclassified declarations of Michael V. Hayden, Director of Central Intelligence; Gordon England, Deputy Secretary of Defense; Keith Alexander, Director of the National Security Agency; Robert Mueller, Director of the Federal Bureau of Investigation; and J. Michael McConnell, Director of National Intelligence. The Government also attached the Secret declaration of Mr. Mueller. In addition, the Government sought leave to file *ex parte* and in camera the Top Secret-SCI declarations of Mr. Alexander and Mr. Hayden for review by judges only. Because the Top Secret—SCI declarations are not material to our disposition of the Government's petition for rehearing, we deny the motion for leave to file the Top Secret—SCI declarations insofar as it pertains to the Government's petition for rehearing by the panel.

I. The Scope of the Record on Review.

As we explained in *Bismullah I*, the Secretary of Defense, in a July 2004 Memorandum for the Secretary of the Navy, established skeletal procedures for the conduct of a CSRT proceeding with respect to a foreign national held at Guantánamo to "review the detainee's status as an enemy combatant." 501 F.3d 178, 181. The Secretary of the Navy then issued a memorandum elaborating upon those procedures in three enclosures, known as E-1, E-2, and E-3 (collectively, the DoD Regulations). See *id.* The DoD Regulations provide that the Tribunal is "authorized," insofar as is relevant here, to

> [r]equest the production of such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings (cumulatively called hereinafter "Government Information").

E-1 § E(3); *see* 501 F.3d at 181. The Recorder must collect the Government Information, examine it, and then decide which information to pass on to the Tribunal. 501 F.3d at 181; E-2 § C(1). The Recorder is required to

> present to the Tribunal such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant . . . (the evidence so presented shall constitute the "Government Evidence") . . . [and, in] the event

> the Government Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also separately provide such evidence to the Tribunal.

E-1 § H(4); E-2 § B(1), C(6).

In *Bismullah I* the Government argued that the record on review should consist solely of the Record of Proceedings, which, under the DoD Regulations, includes only such Government Information as the Recorder forwarded to the Tribunal. *See* 501 F.3d at 182, 185; E-1 § I(4); E-2 § C(8). Taking the view that the record on review should consist of "all evidence reasonably available to the Government," the petitioners contended that the record should include all of the Government Information. 501 F.3d at 184. We held the record on review must include all the Government Information because the DTA requires the court to review the CSRT determination to ensure it is "consistent with the standards and procedures specified by the Secretary of Defense . . . (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence . . .)." DTA § 1005(e)(2)(C).[2] 501 F.3d at 185. Whether the Recorder selected to be put before the Tribunal all exculpatory Government Information, as required by the DoD Regulations, and whether the preponderance of the evidence supported the conclusion of the Tribunal, cannot be ascertained without consider-

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[2] We also held the record on review includes any evidence submitted to the Tribunal by the detainee or his Personal Representative, 501 F.3d at 186, a matter not in dispute here. Nor is it disputed that any material requested by the Tribunal pursuant to the DoD Regulations is part of the record on review.

ation of all the Government Information. 501 F.3d at 185-86.

In its petition for rehearing, the Government asserts that *Bismullah I* defined the record on review to include "a broad and amorphous class of material" out of "a desire to ensure that exculpatory information was properly considered." The Government accordingly objects to *Bismullah I* on three grounds.

First, the Government contends that the Congress "modeled" the DTA on Army Regulation 190-8, which governs how the Army determines the status of an enemy detainee who claims prisoner-of-war status under the Geneva Conventions. The Government asserts that Army Regulation 190-8 does not require "that the military turn over all information in any file concerning a detainee" to the military tribunal that determines his status as a prisoner of war. Putting aside a most obvious distinction that status determinations made pursuant to Army Regulation 190-8 are not subject to direct judicial review, we believe the more important point is that neither does *Bismullah I* require the Government to turn over to the CSRT all information in its files concerning a detainee; adopting the definition of Government Information exactly as it appears in the DoD Regulations themselves, the court in *Bismullah I* required the Government to collect (and preserve for judicial review) only the relevant information in its possession that is reasonably available. 501 F.3d at 185-86. In any event, Army Regulation 190-8 is irrelevant because this court is bound not by it but by the DTA, which charges the court to ensure that the CSRT's determination is consistent with the DoD Regulations and that the conclusion

of the Tribunal is supported by a preponderance of the evidence.

Second, the Government contends that *Bismullah I* imposed upon the Government a greater obligation to "turn over" exculpatory evidence for a detainee than the Due Process Clauses of the Constitution impose upon prosecutors in criminal trials. *See Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Whether the Government is correct—a matter upon which we express no view—is irrelevant for the same reason that Army Regulation 190-8 is irrelevant: as just noted, the DTA requires that the record on review include all the Government Information.

Third, the Government argues—and this seems to be its only real and practical concern—that if *Bismullah I* "is allowed to stand, the Government . . . will be required to undertake searches of all relevant Department of Defense ('DoD') components and all relevant federal agencies in an effort to recreate a 'record' that is entirely different from the record before the Tribunal that made the decision at issue in a DTA case." The burden of collecting all these materials, the Government says, would be so great that it would "divert limited resources and sidetrack the intelligence community from performing other critical national security duties during a time of war." For example, the Government reports that its searches of certain databases for relevant documents are yielding "tens of thousands, and in many cases hundreds of thousands, of documents" relating to a given detainee. According to Deputy Secretary of Defense Gordon England, two offices within the DoD have expended well over 2000 man-hours in a recent effort to

collect material relating to six detainees who have petitioned for review of their status determination.

The Government, it seems, is overreading *Bismullah I* and underreading the DoD Regulations. Those regulations provide that "information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant" comes within the definition of Government Information only if it is "reasonably available." E-1 § E(3); *see* 501 F.3d at 181. In its petition for rehearing, the Government adverts repeatedly to this limitation upon the scope of Government Information. Yet, the Government reports that it "is now conducting . . . entirely new searches of all relevant DoD components and all relevant federal agencies." A search for information without regard to whether it is "reasonably available" is clearly not required by *Bismullah I*.

Indeed, the Government states elsewhere in its petition for rehearing that it does "not believe that the information" it is now seeking "is properly considered 'reasonably available.'"[3] Apparently, the Government is searching for all relevant information without regard to whether it is reasonably available because it did not retain all the Government Information that the Recorder collected.[4] The Government has consequently deter-

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[3] We express no view as to whether any of the information the Government is seeking is not "reasonably available."

[4] The Government tells us "there is no readily accessible set of Government Information for completed CSRTs" and that the Government Information is not "sitting in a file drawer." Thus, it seems that, having collected the Government Information and selected the Government Evidence for the Tribunal to see, the Recorder then did not retain that

mined that it must now search for relevant information without regard to whether the information is reasonably available "because [it] can conceive of no other comprehensive method to ensure that [it] identif[ies] information that the Recorder could have examined." The Government explains that it did not retain all the Government Information because, "[a]t the time, Recorders had no reason to believe that DoD would be required to produce (or explain post hoc) what was *not* provided to the Tribunal." We note in the Government's defense that CSRTs made hundreds of status determinations, including those under review in the present cases, before the DTA was enacted in December 2005 and therefore without knowing what the Congress would later specify concerning the scope and nature of judicial review.

Be that as it may, if the Government cannot, within its resource constraints, produce the Government Information collected by the Recorder with respect to a particular detainee, then this court will be unable to confirm that the CSRT's determination was reached in compliance with the DoD Regulations and applicable law. See 501 F.3d at 186 n.*. The Government does have an alternative: It can abandon its present course of trying to reconstruct the Government Information by surveying all relevant information in its possession without regard to whether that information is reasonably available, and instead convene a new CSRT. If the Government elects to convene a new CSRT, it will have to collect only the Government Information specified by the DoD Regula-

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portion of the Government Information he did not forward to the Tribunal.

tions—that is, the relevant information in its possession that is then *reasonably available.*[5]

In summary, the record on review must include all the Government Information, as defined by the DoD Regulations. If the Government did not preserve that entire body of information with respect to a particular petitioner, then it will have either to reassemble the Government Information it did collect or to convene a new CSRT, taking care this time to retain all the Government Information.

II. Access by the Petitioner's Counsel to Classified Government Information.

The Government also objects to *Bismullah I* insofar as it requires the Government to turn over Government Information to the petitioners' counsel. The Government sees two problems with this: The disclosure of classified Government Information "could seriously disrupt the Nation's intelligence gathering programs"; and

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[5] The Government apparently has convened a second or successive CSRT for a number of detainees. *See* Mark Denbeaux et al., *No-Hearing Hearings, CSRT: The Modern Habeas Corpus? An Analysis of the Proceedings of the Government's Combatant Status Review Tribunals at Guantánamo* 37-39. In addition, pursuant to the DTA, Department of Defense regulations provide that a new CSRT may be convened in the event that material "new evidence" comes to light. DTA § 1005(a)(3); Department of Defense, Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC) at U.S. Naval Base Guantánamo Bay, Cuba, Instruction 5421.1(4)-(5) (May 7, 2007). According to its Director, Frank Sweigart, OARDEC has convened at least one new CSRT pursuant to Instruction 5421.1. *See Al Ginco v. Gates*, No. 07-1090 (D.C. Cir.), Decl. of Frank Sweigart ¶ 4 (Sept. 13, 2007). We express no view as to the availability of any other type of relief in a case in which the Government did not preserve the Government Information with respect to a particular detainee.

the burden of reviewing all the Government Information to determine whether it must be turned over is so great that it will "divert limited resources and sidetrack the intelligence community from performing other critical national security duties during a time of war."

In *Bismullah I*, we dealt with the Government's concern about disclosure by providing, just as the Government urged, that it may withhold from the petitioners' counsel any Government Information that is either "highly sensitive information, or . . . pertain[s] to a highly sensitive source or to anyone other than the detainee." 501 F.3d at 187-88.[6] The Government's need to review the Government Information in order to determine whether it fits within any of these three exceptions gives rise to the Government's present concern about the burden of complying with *Bismullah I*.

Although the Government represented in its brief and at oral argument in *Bismullah I* that it would need to withhold "only a small amount of information" from a detainee's counsel, the Government now indicates that a substantial amount of the Government Information comes within one or another of the three exceptions, thereby "exponentially increas[ing] the magnitude of" its review of Government Information to determine what to withhold. The Government's petition is unclear as to why it now anticipates so much more Government Information will be non-disclosable. Perhaps it is because, as discussed above, the Government has been searching for

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[6] To the extent the Government now suggests that certain information may be too sensitive to disclose even to the court, we leave that issue for case-by-case determination upon *ex parte* motion filed by the Government.

all relevant information without regard to whether it is reasonably available. According to the DoD Regulations, "[c]lassified information . . . which the originating agency declines to authorize for use in the CSRT process is not reasonably available." E-1 § D(2). Consequently, if the Government convenes a new CSRT and the Recorder collects as Government Information only the information in its possession that is both relevant and "reasonably available," then the amount of information to be redacted may indeed be as small as the Government anticipated earlier. We note, however, that, according to the DoD Regulations, when an originating agency withholds relevant information, it must "provide either an acceptable substitute for the information requested or a certification to the Tribunal that none of the withheld information would support a determination that the detainee is not an enemy combatant." E-1 § E(3)(a).

In any event, the proportion of the Government Information that may be withheld from the petitioners' counsel should not affect to an appreciable degree the burden upon the Government of producing the Government Information to the petitioners' counsel. Regardless of how much ultimately may be withheld, the Government will have to conduct the same review of the Government Information in order to make that determination; so much was inherent in the Government's proposed standard for withholding information, which we adopted. Thus, the real import of the Government's argument seems to be that having to review the Government Information to determine whether it must be disclosed creates a substantial burden for the Government and therefore, because the Government obviously cannot

indiscriminately turn over all of the Government Information to the petitioners' counsel, the only solution is to turn over none of it. As we explained in *Bismullah I*, however, entirely *ex parte* review of a CSRT determination is inconsistent with effective judicial review as required by the DTA and should be avoided to the extent consistent with safeguarding classified information. 501 F.3d at 185-86, 187-88.[7]

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[7] Nonetheless, if it is true that most of the Government Information will come within an exception to the requirement that the petitioners' counsel be given access to the Government Information, then the practical effect of the exceptions may yet be that our review of a CSRT determination is in large part *ex parte*.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1197

HAJI BISMULLAH *A/K/A* HAJI BISMILLAH, AND *A/K/A* HAJI BESMELLA, HAJI MOHAMMAD WALI, NEXT FRIEND OF HAJI BISMULLAH, PETITIONERS

v.

ROBERT M. GATES, SECRETARY OF DEFENSE, RESPONDENT

No. 06-1397

HUZAIFA PARHAT, ET AL., PETITIONERS

v.

ROBERT M. GATES, SECRETARY OF DEFENSE, ET AL., RESPONDENTS

No. 07-1508

ABDUSABOUR, PETITIONER

v.

ROBERT M. GATES, U.S. SECRETARY OF DEFENSE, ET AL., RESPONDENTS

No. 07-1509

ABDUSEMET, PETITIONER

v.

ROBERT M. GATES, U.S, SECRETARY OF DEFENSE, ET AL., RESPONDENTS

No. 07-1510

JALAL JALALDIN, PETITIONER

v.

ROBERT M. GATES, U.S. SECRETARY OF DEFENSE, ET AL., RESPONDENTS

No. 07-1511

KHALID ALI, PETITIONER

v.

ROBERT M. GATES, U.S. SECRETARY OF DEFENSE, ET AL., RESPONDENTS

No. 07-1512

SABIR OSMAN, PETITIONER

v.

ROBERT M. GATES, U.S. SECRETARY OF DEFENSE*, ET AL., RESPONDENTS

No. 07-1523

HAMMAD, PETITIONER

v.

ROBERT M. GATES, SECRETARY OF DEFENSE AND WADE F. DAVIS, COLONEL, USA, RESPONDENTS

Filed: Feb. 1, 2008

On Petition for Rehearing En Banc and Motions

BEFORE: GINSBURG, *Chief Judge*, and SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, GARLAND, BROWN, GRIFFITH, and KAVANAUGH, *Circuit Judges*

ORDER

Respondents' petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing and the motion to expedite review of the petition for rehearing en banc and any subsequent proceedings; the motion for leave to file ex parte/in camera top secret-SCI declarations for judges' review only and the joint opposition thereto; and the letters filed pursuant to Federal Rule of Appellate Procedure 28(j), it is

ORDERED that the petition for rehearing en banc be denied. It is

FURTHER ORDERED that the motion to expedite be dismissed as moot. It is

FURTHER ORDERED that the motion for leave to file ex parte/in camera top secret-SCI declarations for judges' review only be granted.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Deputy Clerk

Circuit Judges SENTELLE, HENDERSON, RANDOLPH, BROWN, and KAVANAUGH would grant the petition for rehearing en banc.

A separate statement concurring in the denial of rehearing en banc filed by *Chief Judge* GINSBURG, with whom *Circuit Judges* ROGERS, TATEL, and GRIFFITH join, is attached.

A separate statement concurring in the denial of rehearing en banc filed by *Circuit Judge* GARLAND is attached.

A separate statement dissenting from the denial of rehearing en banc filed by *Circuit Judge* HENDERSON, with whom *Circuit Judges* SENTELLE, RANDOLPH, and KAVANAUGH join, is attached.

A separate statement dissenting from the denial of rehearing en banc filed by *Circuit Judge* RANDOLPH, with whom *Circuit Judges* SENTELLE, HENDERSON, and KAVANAUGH join, is attached.

A separate statement dissenting from the denial of rehearing en banc filed by *Circuit Judge* BROWN is attached.

GINSBURG, *Chief Judge*, with whom *Circuit Judges* ROGERS, TATEL, and GRIFFITH join, concurring in the denial of rehearing en banc: The panel that heard this case held that "the record on review must include all the Government Information," which the controlling DoD Regulations define as "reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant." *Bismullah v. Gates (Bismullah II)*, 503 F.3d 137, 138-39 (2007); *Bismullah v. Gates (Bismullah I)*, 501 F.3d 178, 185-86 (2007); E-1 § E(3). In his dissent from the court's denial of rehearing *en banc*, Judge Randolph says of the panel's ruling that it "is contrary to the rule and the statute governing the contents of the record in cases such as these, it violates the restrictions on our jurisdiction in the Detainee Treatment Act [(DTA), Pub. L. No. 109-148, § 1005(e)(2), 119 Stat. 2680, 2742-43 (Dec. 30, 2005) (codified as amended at 10 U.S.C. § 801 note)], and it risks serious security breaches for no good reason." Stmt. of Randolph, J., at 1. Like Judge Randolph, I would not ordinarily write a separate opinion on a denial of rehearing *en banc*, but his suggestion that the panel's decision was not only erroneous but also dangerous should not go unremarked.

Judge Randolph contends that 28 U.S.C. § 2112(b) and Federal Rule of Appellate Procedure 16(a), which implements § 2112(b), "make crystal clear that . . . the

record does not include information never presented to the Combatant Status Review Tribunal" (CSRT).[1] 1 Stmt. of Randolph, J., at 1-2. Section 2112(b) states: "The record to be filed in the court of appeals . . . shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned." *Accord* FED. R. APP. P. 16(a). The term "agency," in turn, "includes any department, independent establishment, commission, administration, authority, board or bureau of the United States . . . unless the context shows that such term was intended to be used in a more limited sense." 28 U.S.C. § 451. Judge Randolph asserts that § 2112(b) applies to our review pursuant to the DTA of a CSRT's status determination because a CSRT is within a military department and a "military department is a 'department' under § 451, and thus an 'agency' under § 2112(b)." Stmt. of Randolph, J., at 3.

Section 2112(b) does not define the record on review of a CSRT proceeding because a military department is not an agency under 28 U.S.C. § 451. Several provisions of Title 28 distinguish between an "agency" and a "military department," which necessarily implies that a military department is not an agency. *See* 28 U.S.C.

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[1] Judge Randolph also implies the panel ignored the provisions of the DoD Regulations that define the "Record of Proceedings" before the CSRT, namely, E-2 § C(8) & (10). In fact, the panel not only epitomized both E-2 § C(8) and E-2 § C(10), *see Bismullah I*, 501 F.3d at 182; *see also Bismullah II*, 503 F.3d at 139 (citing E-2 § C(8)), it expressly rejected the Government's contention that the Record of Proceedings constitutes the record on review for reasons stated in the panel's two opinions. *See Bismullah I*, 501 F.3d at 18486; *Bismullah II*, 503 F.3d at 139-41.

§ 530D(e) ("executive agencies and military departments"); 28 U.S.C. § 530C(b)(L)(iv) ("executive agency or military department"); 28 U.S.C. § 530D(d) ("executive agency or military department"); *cf.* 28 U.S.C. § 2671 (defining "[f]ederal agency" specifically to include "the military departments" for purposes of certain sections of Title 28 that have no bearing upon § 2112).[2]

Judge Randolph dismisses these provisions on the ground that in them the term "agency" is always modified by "executive" or "federal," which suggests a more limited conception of "agency" there than in § 451, where it appears without modification. Stmt. of Randolph, J., at 3. For confirmation, he points to § 2 of the Administrative Procedure Act, 5 U.S.C. § 551(1)(F), which excludes "courts martial and military commissions" from the definition of "agency" for purposes of that Act. Stmt. of Randolph, J., at 3 & n.3. Judge Randolph seems to believe that by defining "agency" broadly and then excluding courts martial and military commissions, the APA implies that courts martial and military commissions are agencies except where "expressly excluded"; because Title 28, unlike the APA, does not expressly exclude courts martial and military commissions from its scope, courts martial and military commissions are presumably agencies for purposes of that title, including §§ 451 and 2112.

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[2] *See W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 88-92, 100-01 (1991) (holding "attorney's fees" and "expert fees" distinct for purposes of 42 U.S.C. § 1988 because "[i]f . . . the one includes the other, dozens of statutes referring to the two separately become an inexplicable exercise in redundancy").

This reasoning tells us nothing about a CSRT, however, unless a CSRT is a court martial or military commission, which it assuredly is not. *See* 10 U.S.C. § 802 (specifying persons subject to court martial); 10 U.S.C. § 817 (defining jurisdiction of court martial); 10 U.S.C. §§ 877-934 (enumerating substantive offenses that may be tried before a court martial); *see* 10 U.S.C. § 948b(f) (defining "military commission"); 10 U.S.C. § 948d(c) (distinguishing military commission from CSRT); *compare* DTA § 1005(e)(2) ("Review of decisions of combatant status review tribunals of propriety of detention") *with* DTA § 1005(e)(3) ("Review of final decisions of military commissions").[3] Not coming within any exclusion from the APA, therefore, a CSRT must be either an agency subject to the APA or, as I believe it is, something *sui generis* and outside the contemplation of the APA. If a CSRT were an agency subject to the APA, then the detainees at Guantánamo would presumably be entitled to the significant procedural rights afforded by the APA. The notion that a CSRT is subject to the APA is completely inconsistent with the Congress' understanding when, by enacting the DTA, it ratified the procedural framework for CSRTs established by the DoD Regulations. In summary, a CSRT can be structured as it is under the DoD Regulations only because it is not a

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[3] Judge Randolph says 5 U.S.C. § 551 also expressly excludes "other military authorities." Stmt. of Randolph, J., at 3 n.3. In fact, the exclusion is for "military authority exercised in the field in time of war or in occupied territory." 5 U.S.C. § 551(1)(G). Citing his own concurring opinion in *Al Odah v. United States*, 321 F.3d 1134, 1149 (2003), Judge Randolph argues a CSRT is a military authority exercised in the field in a time of war. Stmt. of Randolph, J., at 3 n.3. No court has ever so held and, in any event, no party to this case has suggested as much.

court martial, not a military commission, and not an agency.[4]

It would be particularly untoward to apply § 2112(b) outside its apparent field of application—and particularly improbable the Congress so intended—when the result would be to preclude the court from discharging the review function assigned to it in the DTA. That review function is broader than Judge Randolph suggests. The DTA charges the court with reviewing not only "whether . . . the conclusion of the Tribunal [was] supported by a preponderance of the evidence," but also whether it was reached in a manner "consistent with the standards and procedures specified by the Secretary of Defense" for CSRTs. DTA § 1005(e)(2)(C).

The DoD Regulations, which establish the "standards and procedures" to be followed by the Recorder, the detainee's Personal Representative, and the CSRTs themselves, require the Recorder to obtain all the Government Information, E-1 § C(2); E-2 § C(1), to cull from the Government Information and forward to the Tribunal such information "as may be sufficient to support the detainee's classification as an enemy combatant" together with all exculpatory information, E-1 § H(4); E-2 §§ B(1), C(6), and to share all the Government Information with the detainee's Personal Representative, E-1 § F(8); E-2 § C(4). In order to review whether the Recorder performed these tasks, the court

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[4] Of course, if a CSRT were a court martial or a military commission, then the detainees would be entitled to greater procedural rights than they have under the DoD Regulations. *See* 10 U.S.C. §§ 830-876b (defining procedures for court martial); 10 U.S.C. §§ 948q-950j (defining procedures for military commission).

obviously must see all the Government Information.[5] *See Bismullah I*, 501 F.3d at 185-86; *Bismullah II*, 503 F.3d at 139-40. Further, the court will be able to assess whether any failure by the Recorder to perform these tasks affected the weight of the evidence before the CSRT only if the court can consider that failure in light of all the information the Recorder was supposed to collect and forward. *See Bismullah I*, 501 F.3d at 185-86; *Bismullah II*, 503 F.3d at 139-40. Irrespective, therefore, of what § 2112 might say in general about the scope of a record on review, the DTA requires that the record on review of a CSRT's status determination include all the Government Information, regardless whether it was all put before the Tribunal.

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[5] The record before the court suggests the Recorder has not always fulfilled his obligations under the DoD Regulations. *See* Decl. of Stephen Abraham, Lieutenant Colonel, U.S. Army Reserve ¶¶ 5-19 (June 15, 2007) (stating "the information comprising the Government Information and the Government Evidence was not compiled personally by the CSRT Recorder;" "on a number of occasions" his request that an originating agency provide "a written statement that there was no exculpatory evidence . . . [was] summarily denied;" the people "preparing materials for use by the CSRT board members did not know whether they had examined all available information or even why they possessed some pieces of information but not others;" and "the case writer or Recorder, without proper experience or a basis for giving context to information, often rejected some information arbitrarily while accepting other information without any articulable rationale"); Decl. of James M. McGarrah, Rear Admiral (Ret.), U.S. Navy ¶¶ 4-6, 10-13 (May 31, 2007) (stating that after September 1, 2004 the Recorder did not "personally collect[] the Government Information" and that the Recorder withheld from the Tribunal exculpatory Government Information if in his view it was "duplicative" or "if it did not relate to a specific allegation being made against the detainee").

Judge Randolph lodges two pragmatic objections to this analysis. First, he argues "it is impossible for us to determine whether any particular piece of information was obtained or was not obtained by any particular Recorder in any particular detainee's case" because "Recorders . . . did not save the information they obtained unless" they forwarded it "to the Tribunal." Stmt. of Randolph, J., at 5-6. Judge Randolph is correct—which is why the panel held the Government could either "reassemble the Government Information it did collect or . . . convene a new CSRT." *Bismullah II*, 503 F.3d at 141-42.[6]

Second, Judge Randolph argues that "at most . . . the record on review should consist only of the evidence before the Tribunal plus any exculpatory information the government has discovered." Stmt. of Randolph, J., at 6. Of course, the Recorder is supposed to forward *all* the exculpatory Government Information to the Tribunal. *See* E-1 § H(4); E-2 §§ B(1), C(6). But the court is no more able than the CSRT itself to determine whether the Recorder withheld any exculpatory Government Information from the CSRT—unless, that is, subject to the national security limitations discussed below, counsel may see and draw the attention of the court to any arguably exculpatory Government Information the Recorder did not put before the Tribunal. *See* Decl. of Stephen Abraham, Lieutenant Colonel, U.S. Army Reserve

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[6] The Government is reportedly now "review[ing] . . . whether to conduct new hearings" out of concern that it may not have "take[n] everything into consideration when [it] did the original" CSRTs. William Glaberson, *New Detention Hearings May Be Considered*, N.Y. TIMES, Oct. 14, 2007 (quoting Capt. Theodore Fessel, Jr.), *available at* http://www.nytimes.com/2007/10/14/us/14cnd-gitmo.html.

¶¶ 10-17 (June 15, 2007) ("asked to confirm and represent in a statement to be relied upon by the CSRT board members that the [originating intelligence] organizations did not possess 'exculpatory information' relating to [detainees who were] the subject of the CSRT, . . . [I could not] reach [such] a conclusion . . . without knowing that I had seen all information, [but I] was never told that the information that was provided [to me by the originating organizations] constituted all available information").

One need not impute to the Recorder negligence much less bad faith to see that the DTA requires the court to review his adherence to the DoD Regulations. Because the DoD Regulations assign to the Recorder a central role in the CSRT process, to ignore the actions of the Recorder—and especially to ignore the evidence the Recorder did not put before the Tribunal—would render utterly meaningless judicial review intended to ensure that status determinations are made "consistent with" the DoD Regulations. DTA § 1005(e)(2)(C). Unlike the final decision rendered in a criminal or an agency proceeding, which is the product of an open and adversarial process before an independent decisionmaker, a CSRT's status determination is the product of a necessarily closed and accusatorial process in which the detainee seeking review will have had little or no access to the evidence the Recorder presented to the Tribunal, little ability to gather his own evidence, no right to confront the witnesses against him, and no lawyer to help him prepare his case, and in which the decisionmaker is employed and chosen by the detainee's accuser. *See* E-1 §§ A, B, C(1), C(3), E(2), E(4), F, G(2),

G(8), G(9), H(7).[7] As a result, the Recorder's failure to adhere to the DoD Regulations can influence the outcome of the proceeding to a degree that a prosecutor or an agency staff member cannot; as a practical matter, the Recorder may control the outcome. For this court to ignore that reality would be to proceed as though the Congress envisioned judicial review as a mere charade when it enacted the DTA. Thus, the analogy Judge Henderson draws between our review of status determinations under the DTA and our review of agency decisions, Stmt. of Henderson, J., at 3-4, is inapt.

Judge Henderson's comparison of a status determination proceeding before a CSRT to a probable cause hearing for a criminal defendant is likewise wide of the mark. She asks, "If we can determine whether the preponderance of the evidence supports a probable cause finding sufficient to hold an arrestee for trial without knowing (much less, reviewing) all the evidence in the prosecutor's possession, can we not do so in reviewing the evidence supporting the 'enemy combatant' designation?" Stmt. of Henderson, J., at 2-3. The critical question, however, is not whether it is possible for the court to review the determination of a CSRT based solely upon the evidence that was before the CSRT, but whether that would be the presumably meaningful review the Congress prescribed. Note also that a panoply of constitutional and statutory protections ensures that

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[7] The detainee obviously cannot be given access to the classified portion of the Government Information. The detainee's Personal Representative, who is "neither a lawyer nor [the detainee's] advocate," E-3 § D, is not obligated to but "may share the unclassified portion of the Government Information with the detainee." E-1 §§ F(8), G(8), H(7).

a person imprisoned after a probable cause hearing will receive a speedy trial and be convicted or released, thereby mitigating the impact of an erroneous finding of probable cause predicated upon limited and possibly one-sided evidence. In contrast, the determination of a CSRT is only a determination of the detainee's status as an enemy combatant.[8] Thereafter, it may be that nothing prevents the Government from holding an enemy combatant "for the duration of the relevant conflict." *Hamdi v. Rumsfeld*, 542 U.S. 507, 518-21 (2004)[9]; *see Boumediene v. Bush*, 476 F.3d 981, 988-94 (D.C. Cir. 2007) (holding alien detained as enemy combatant at

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[8] The DoD Regulations define an enemy combatant as "an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." E-1 § B; *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004): "The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again." The Government reportedly "hope[s] to try eventually as many as 80 of the 305 detainees at Guantánamo," William Glaberson. *Witness Names to Be Withheld From Detainee*, N.Y. TIMES, Dec. 1, 2007, *available at* http://www.nytimes.com/2007/12/01/us/nationalspecial3/01gitmo.html, which suggests that, if the Government intends to continue holding the remaining 225 detainees, it intends to do so solely upon the basis of their status determinations.

[9] The Supreme Court left open the question whether the Government may subject an enemy combatant to an "indefinite or perpetual detention." *Hamdi*, 542 U.S. at 521 ("[W]e understand Congress' grant of authority for use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date.") (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001)).

Guantánamo Bay has no constitutional right to writ of habeas corpus), *cert. granted*, 127 S. Ct. 3078 (June 29, 2007) (No. 06-1195).

Finally, Judge Randolph raises the concern that "sharing [the Government Information] with private counsel [will] give[] rise to a severe risk of a security breach." Stmt. of Randolph, J., at 6. The panel, however, accommodated, to the full extent requested by the Government, its position that certain types of Government Information cannot be disclosed to the petitioners' counsel without jeopardizing national security. The panel "provid[ed], just as the Government urged, that it may withhold from the petitioners' counsel any Government Information that is either 'highly sensitive information, or . . . pertain[s] to a highly sensitive source or to anyone other than the detainee,'" as long as the Government makes the withheld information available to the court for review *in camera*. *Bismullah II*, 503 F.3d at 142 (quoting *Bismullah I*, 501 F.3d at 187). The panel also stressed that, under the DoD Regulations, "'information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant' comes within the definition of Government Information only if it is 'reasonably available.'" *Bismullah II*, 503 F.3d at 141 (quoting E-1 § E(3)); *see also Bismullah I*, 501 F.3d at 180, 192. And, as the panel observed, an "originating agency" may, pursuant to the DoD Regulations, "decline[] to authorize [classified information] for use in the CSRT process," presumably for reasons of national security, in which case that classified information is deemed "not reasonably available" and accordingly is not Government Information. E-1 § D(2); *see Bismullah*

II, 503 F.3d at 142-43. If these options are insufficient to safeguard national security, then the Secretary of Defense, to whom the DTA assigns responsibility for establishing the standards and procedures that govern CSRTs, may revise the DoD Regulations.

Judge Brown criticizes the panel's "reliance" upon the term "reasonably available" because it "provides not a process-based definition, but an abstract legal standard." Stmt. of Brown, J., at 1. The panel, however, did not invent the "reasonably available" standard; it is a feature of the controlling DoD Regulations. Further, the "reasonably available" standard is not as open-ended as Judge Brown suggests, in important part because, as just noted, the national security agencies may withhold classified information from the Recorder, thereby rendering it "not reasonably available."

In closing, I note that the Supreme Court, in the order granting a writ of *certiorari* in *Boumediene*, stated that "it would be of material assistance to consult any decision" reached by this court in *Bismullah*. Judge Henderson contends that "we do the Supreme Court no favor by not fully considering potentially determinative matters." Stmt. of Henderson, J., at 6 n.6. After merits briefing, oral argument, an opinion by the panel (in which Judge Henderson joined), a petition for rehearing and a response thereto, the petitioners' post-argument letter filed pursuant to FRAP 28(j) and the Government's response thereto, and a supplemental opinion by the panel (in which Judge Henderson again joined), there can be no doubt that all the issues presented in the parties' procedural motions have been aired and fully considered.

GARLAND, *Circuit Judge*, concurring in the denial of rehearing en banc: On June 29, 2007, the Supreme Court granted the detainees' petition for certiorari in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007). In granting that petition, the Court advised the parties that "it would be of material assistance to consult any decision in *Bismullah, et al. v. Gates*, . . . currently pending in the United States Court of Appeals for the District of Columbia Circuit," and that "supplemental briefing will be scheduled upon the issuance of any decision" in that case. *Boumediene v. Bush*, 127 S. Ct. 3078 (2007). The Supreme Court heard oral argument in *Boumediene* on December 5, 2007. Were we to grant en banc review in *Bismullah*, we would plainly delay our decision and hence the Supreme Court's disposition of *Boumediene*. As delaying the latter is contrary to the interests of all of the parties, as well as to the public interest, I concur in the denial of rehearing en banc without reaching the merits.

KAREN LECRAFT HENDERSON, *Circuit Judge*, with whom *Circuit Judges* SENTELLE, RANDOLPH, and KAVANAUGH join, dissenting from the denial of rehearing en banc: The Detainee Treatment Act of 2005 (DTA) gives exclusive jurisdiction to this Court "to determine the validity of any final decision of [the] Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." Pub. L. No. 109-148 § 1005(e)(2)(A), 119 Stat. 2680, 2742 (Dec. 30, 2005). While the DTA is not unique in this respect, to me our exclusive jurisdiction underscores the charge given to our *entire* Court to hear and weigh all issues fairly encompassed in determining the validity of the CSRT's decision. Granted, we are now only at the preliminary

stage of that determination, that is, resolving procedural motions. In two respects, however, I am convinced that our entire Court should hear and consider the protective order which both sides have asked us to enter. Accordingly, I dissent from the *en banc* denial.[1]

I. The Scope of the Record on Review.

Bismullah II attempts to correct the Government's overreading of *Bismullah I*'s description of the record on review by, first, repeating the panel's reading of the Government Information (defined by DoD Regulation E-1 § E(3)) as including only information "reasonably available" (again, specified by DoD Regulation E-1 § E(3)) and, then, by concluding that "information without regard to whether it is 'reasonably available' is clearly not required by *Bismullah I*." *Bismullah II*, 503 F.3d at 141. *Bismullah II*, however, leaves intact the panel's original conclusion that "whether the preponderance of the evidence supported the conclusion of the Tribunal, cannot be ascertained without consideration of all the Government Information." *Id.* at 140 (citing *Bismullah I*, 501 F.3d at 185-86.)

Why we are unable to *otherwise* conduct our limited review of the validity of the CSRT's decision is left

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[1] I note that, as a member of the panel whose original opinion issued on July 20, 2007, *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007) (*Bismullah I*), and whose opinion denying the Government's petition for panel rehearing issued on October 3, 2007, *Bismullah v. Gates*, 503 F.3d 137 (D.C. Cir. 2007) (*Bismullah II*), I joined both opinions. Nevertheless, as set forth hereinbelow, matters remain that were unaddressed at the panel level—matters that may be determinative and should at least be heard and weighed by all of us.

largely unexplained.[2] But in the criminal context—where the protections accorded the arrestee are greater and our review is, accordingly, more searching—our Court is plainly able to review the conduct of a preliminary hearing without knowing *all* the evidence the prosecution has gathered. The reason, of course, is that the preliminary hearing is limited in scope. *Coleman v. Burnett*, 477 F.2d 1187, 1201 (D.C. Cir. 1973) ("The preliminary hearing is not a minitrial of the issue of guilt, . . . 'A preliminary hearing,' the Supreme Court has said, 'is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.'" (quoting *Barber v. Page*, 390 U.S. 719, 725 (1968))). So too is the CSRT's mission: that is, at this stage, it must decide simply whether the detainee is an enemy combatant. Only if he is one can he, presumably, then be held for trial before a military commission. If we can determine whether the preponderance of the evidence supports a probable cause finding sufficient to hold an arrestee for trial without knowing (much less, reviewing) all the evidence in the prosecutor's possession, can we not do so in reviewing the evidence supporting the "enemy combatant" designation?[3] And should not all of

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[2] *Bismullah I* does note that "the court cannot, as the DTA charges us, consider whether a preponderance of the evidence supports the Tribunal's status determination without seeing all the evidence, any more than one can tell whether a fraction is more or less than one half by looking only at the numerator and not at the denominator." *Bismullah I*, 501 F.3d at 186.

[3] A detainee is not a criminal defendant. "The capture and detention of lawful combatants and the capture, detention, and trial of unlawful

us at least hear the arguments for and against, especially in the national security context? And especially given the showing the Government has made in both its unclassified and *ex parte* and *in camera* submissions? *Bismullah II*, 503 F.3d at 138 n.1.

Even if we use the administrative agency analogy instead, the Supreme Court has made clear that we have no license to "create" a record consisting of more than the agency itself had before it. *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."); *Doraiswamy v. Sec'y of Labor*, 555 F.2d 832, 839-40 (D.C. Cir. 1976) ("This circumscription [that review be confined to the administrative record], which the Court has consistently honored in other cases, stems from well ingrained characteristics of the administrative process. The administrative function is statutorily committed to the agency, not the judiciary. A reviewing court is not to supplant the agency on the administrative aspects of the litigation. . . . The grounds upon which

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combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942)). "The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again." *Id.* (citing Naqvi, Doubtful Prisoner-of-War Status, 84 Int'l Rev. Red Cross 571, 572 (2002) ("[C]aptivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war'" (quoting decision of Nuremberg Military Tribunal, *reprinted in* 41 Am. J. Int'l L. 172, 229 (1947))); W. Winthrop, Military Law and Precedents 788 (rev. 2d ed. 1920) ("'A prisoner of war is no convict; his imprisonment is a simple war measure'" (citations omitted))).

an administrative order must be judged are those upon which the record discloses that its action was based . . . .") (internal citations, quotations and footnotes omitted); *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 793 (D.C. Cir. 1984) (explaining that the record for the reviewing court is limited to "that information before the [agency] *at the time of [its] decision*, . . . thus excluding *ex post* supplementation of the record by either side."); *Mail Order Ass'n of Am. v. U.S. Postal Serv.*, 2 F.3d 408, 433-34 (D.C. Cir. 1993) (same). Again, should we not at least hear and weigh the arguments for and against in the national security context?

II. Detainees' Counsel's Access to Classified Government Information.

Bimullah II also attempts to corral the Government Information, much of which, as the Government's submissions make clear, is classified, that must be disclosed to the detainees' counsel by emphasizing the exceptions from disclosure for information that is "'highly sensitive . . . or . . . pertain[s] to a highly sensitive source or to anyone other than the detainee.'" *Bimullah II*, 503 F.3d at 142 (quoting *Bismullah I*, 401 F.3d at 187) (alteration in original).[4] *Bismullah II*, however, may be unrealistically sanguine about the Government's resulting burden if the presumption is that it must disclose all Government Information except what fits within the exceptions; according to the Government's submissions, which, I submit, we are ill-equipped to second-guess, the exceptions swamp the disclosable information. *Cf. Krikorian*

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[4] *Bismullah I* had "*presume[d]* counsel for a detainee has a 'need to know' *all* Government Information concerning his client, not just the portions of the Government Information presented to the Tribunal." *Bismullah I*, 501 F.3d at 187 (emphases added).

v. Dep't of State, 984 F.2d 461, 464 (D.C. Cir. 1993).[5] But the alternative is not necessarily limited to what *Bismullah II* describes, namely, "the only solution is [for the Government] to turn over none of [the Government Information]." *Bismullah II*, 503 F.3d at 142. If the record on review is more limited as discussed *supra*, the detainees' counsel's access likewise contracts. Again, should we not *all* consider this alternative?

We have heard by unclassified declarations from Michael V. Hayden, Director of the Central Intelligence Agency; Gordon England, Deputy Secretary of the Department of Defense; Keith Alexander, Director of the National Security Agency; Robert Mueller, Director of the Federal Bureau of Investigation; and J. Michael McConnell, Director of National Intelligence. We have heard by Secret declaration from FBI Director Mueller. And we have heard *ex parte* and *in camera* by Top Secret-SCI declarations from CIA Director Hayden and NSA Director Alexander. In the unclassified declarations, the five officials—charged with safeguarding our country while we are now at war—have detailed the grave national security concerns the *Bismullah I* holding presents. "Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." *Hamdi*, 542 U.S. at 531 (citing *Dep't of Navy v. Egan*, 484 U.S. 518,

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[5] I leave aside this Court's likely burden if we do not consider *en banc* the scope of the Government Information disclosable to the detainees' counsel. As *Bismullah II* itself notes, "if it is true that most of the Government Information . . . come[s] within an exception . . . , the practical effect . . . may yet be that our review . . . is in large part *ex parte*." *Bismullah II*, 503 F.3d at 143 n.7.

530 (1988) (noting reluctance of courts "to intrude upon the authority of the Executive in military and national security affairs")). In *Hamdi*, the Government represented that "military officers who are engaged in the serious work of waging battle [will] be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations [will] both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war." *Hamdi*, 542 U.S. at 531-32. The High Court agreed, declaring "[t]o the extent that these burdens are triggered by heightened procedures, they are properly taken into account." *Id.* at 532. I believe our Court should likewise take these burdens into account sitting *en banc*.[6] For the foregoing reasons I dissent from the denial of rehearing *en banc* and join Judge Randolph's dissent.

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[6] I note, in granting the detainees' certiorari petition in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), the Supreme Court advised that "[a]s it would be of material assistance to consult any decision in *Bismullah et al. v Gates*, No. 06-1197, . . . supplemental briefing will be scheduled" once our Court's decision issues. *Boumediene v. Bush*, 127 S. Ct. 3078 (2007). *En banc* review would plainly delay our decision and thus tighten the time frame for the supplemental briefing the *Boumediene* parties must submit. Nonetheless we do the Supreme Court no favor by not fully considering potentially determinative matters, including these herein discussed. Although, as Chief Judge Ginsburg lists, Stmt. of Ginsburg, C.J., at 12, we have shuffled much paper in this case, we have yet to consider—with the benefit of briefing and oral argument—any of the issues raised by the three dissents from the *en banc* denial.

RANDOLPH, *Circuit Judge*, with whom *Circuit Judges* SENTELLE, HENDERSON and KAVANAUGH join, dissenting from the denial of rehearing en banc: It has long been my practice not to write or join opinions on denials of rehearing en banc. *See Indep. Ins. Agents of Am., Inc. v. Clarke*, 965 F.2d 1077, 1080 (D.C. Cir. 1992). I must now depart from that practice. According to affidavits of the Directors of the Central Intelligence Agency, the Federal Bureau of Investigation, and the National Security Agency and the Director of National Intelligence, the court's ruling in these cases endangers national security. The cases deserve to be reheard and reexamined by the full court. I therefore dissent from the denial, by a vote of 5 to 5, of rehearing en banc. Here are the reasons.

The panel opinion denying rehearing asserts that the agencies just mentioned and the Department of Justice, including the Solicitor General, do not understand the original opinion. We think these executive departments understand full well what the panel ordered. The government must file, as the "record" in each detainee review case, vast reams of classified information to be shared presumptively with private defense counsel, regardless whether any of this information was ever presented to the Combatant Status Review Tribunal, whose decision is the subject of judicial review. That order is contrary to the rule and the statute governing the contents of the record in cases such as these, it violates the restrictions on our jurisdiction in the Detainee Treatment Act, and it risks serious security breaches for no good reason.

The Detainee Treatment Act does not specify what shall be in the record when we review Tribunal deci-

sions. This is understandable because a separate statute governs "the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers." 28 U.S.C. § 2112(a). Subsection (b) of this statute, and Rule 16(a) of the Federal Rules of Appellate Procedure, which is based on it, make crystal clear that —contrary to the panel's opinions—the record does not include information never presented to the Combatant Status Review Tribunal.[1] Yet neither of the panel's two opinions even mentions Rule 16(a) or § 2112(a).[2]

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[1] The statute provides that the "record to be filed in the court of appeals . . . shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, *evidence*, and proceedings *before the agency*, board, commission, or officer concerned . . . ." 28 U.S.C. § 2112(b) (italics supplied). Rule 16(a) of the appellate rules states the same. The government's merits brief not only cited Rule 16 but also discussed why the record it filed was in compliance with the rule. Respondent Br. 54-55. That discussion sufficiently alerted the panel not only to the rule but also to the statute: the Advisory Committee Notes to Rule 16 state that "[s]ubdivision (a) is based upon 28 U.S.C. § 2112(b)."

[2] The Department of Defense regulation directly on point provides that the "official record of the Tribunal's decision" shall consist of: "(a) A statement of the time and place of the hearing, persons present, and their qualifications; (b) The Tribunal Decision Report cover sheet; (c) The classified and unclassified reports detailing the findings of fact upon which the Tribunal decision was based; (d) Copies of all documentary evidence presented to the Tribunal and summaries of all witness testimony. If classified material is part of the evidence submitted or considered by the Tribunal, the report will be properly marked and handled in accordance with applicable security regulations; and (e) A dissenting member's summary report, if any." E-2 §§ (C)(10), (C)(8).

Chief Judge Ginsburg, in his opinion concurring in the denial of rehearing en banc, offers two explanations. The first is that several other provisions in Title 28—not applicable here—differentiate between an "executive agency" and a "military department." Stmt. of Ginsburg, C.J., at 2-5. While intended to show that a Combatant Status Review Tribunal is not an "agency" for the purposes of § 2112(b), it indicates the opposite. In Title 28, "'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States . . . unless the context shows that such term was intended to be used in a more limited sense." 28 U.S.C. § 451. Chief Judge Ginsburg's citations illustrate how Congress has limited "agency" in other contexts by using modifiers such as "executive" and "federal." Section 2112(b) contains no such limit. A military department is a "department" under § 451, and thus an "agency" under § 2112(b). Therefore, § 2112(b) applies to a Combatant Status Review Tribunal, which certainly falls within the ambit of the broad definition of "agency" in Title 28. The framers of the Administrative Procedure Act concluded that military commissions would be covered as "agencies," unless they were expressly excluded from the Act. 5 U.S.C. § 551(1)(F).[3]

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[3] The Attorney General's Manual refers to courts martial, military commissions, and other military authorities as "agencies of the United States," *Attorney General's Manual on the Administrative Procedure Act* 10 (1947), and then explains that they have been "specifically exempted" from the APA in what is now 5 U.S.C. § 551(1)(F), *Id.* at 12.

Chief Judge Ginsburg argues that Combatant Status Review Tribunals are *sui generis* and for that reason are exempt from the requirements of the APA. We agree that the APA exempts Combatant Status Review Tribunals, but not because they are *sui generis*. Instead, the detention of enemy combatants, and the review processes related to

The Chief Judge's second explanation for disregarding § 2112(b) exposes still another problem with the panel's reasoning. He writes that to follow § 2112(b)'s law governing the contents of the record "would be to preclude the court from discharging the review function assigned to it in the" Detainee Treatment Act. Stmt. of Ginsburg, C.J., at 5. What exactly is this "review function"? Apparently the idea is that the court will look at how well the Recorder did his job in gathering "Government Information" and how well he culled it in presenting the information to the Tribunal as "Government Evidence."[4] *Id.* at 5-9.

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them, are military "functions" the APA specifically exempts. The writer's opinion in *Al Odah v. United States*, 321 F.3d 1134, 1149 (D.C. Cir. 2003), attached hereto as an addendum, explains why. In any event, Chief Judge Ginsburg's argument misses the point. Our review in this case is controlled not by the APA, but by 28 U.S.C. § 2112. The Chief Judge does not explain why the broad, unmodified term "agency" in § 2112 excludes a Combatant Status Review Tribunal.

[4] Under Defense Department regulations, "Government Information" is "reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant." E-1 § (E)(3). "Government Evidence" is "such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant." E-1 § (H)(4).

The panel did not seem to appreciate the large difference between "information" and "evidence." It stated that "whether the preponderance of the evidence supported the conclusion of the Tribunal, cannot be ascertained without consideration of all the Government Information." *Bismullah v. Gates*, slip op. at 5 (*Bismullah II*), citing *Bismullah v. Gates*, 501 F.3d 178, 186 (D.C. Cir. 2007) (*Bismullah I*). That rationale could not hold and the Chief Judge seems to have abandoned it. In legal proceedings before courts and other adjudicative bodies, the classic definition of "evidence" is "any matter of fact which is furnished to a legal tribunal otherwise than by reasoning, as the basis of inference in ascertaining some other matter of fact." James B. Thayer, *Presump-*

Forget for the moment that the Detainee Treatment Act limits our jurisdiction to review of the *Tribunal's* status determination. DTA § 1005(e)(2)(C)(i). Ignore as well that under the controlling regulations it is the Tribunal, not the court, who supervises the Recorder. E-1 § (C)(2). Even so the question remains—how does the court's order requiring the government to assemble a record consisting of all "reasonably available" information bearing on the detainee's status enable the court to determine whether the Recorder adequately performed his job in gathering information? This is an essential question and neither the panel nor Chief Judge Ginsburg has ever given a satisfactory answer to it.

Perhaps the panel envisioned our court examining the thousands of documents[5] making up the "record" on review and seeing how much of this information escaped the Recorder's attention. But the government has pointed out the fallacy in that vision, which contemplates a comparative judgment. The Recorders, operating before Congress passed the Detainee Treatment Act, did

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tions and the Law of Evidence, 3 HARV. L. REV. 141, 143 (1889). Moreover, the Detainee Treatment Act, in speaking of a preponderance of the evidence, refers to "the requirement" that the Tribunal's conclusion be so supported. DTA § 1005(e)(2)(C)(i). The reference is to Defense Department regulation E-1 § (G)(11) dealing with the burden of proof. In context it is clear as a bell that the "evidence" in the regulation and in the Act means the evidence before the Tribunal, not some pile of information the Recorder decided not to present. The panel thus erred in saying that to determine whether there was enough evidence to support the Tribunal's decision, the court had to look through information the Tribunal never saw.

[5] The government predicts that for each detainee, the record envisioned by the panel will consist of "hundreds of thousands[] of documents." Pet. for Rehearing 10.

not save the information they obtained unless it became part of the permanent record when they presented it to the Tribunal. So even if this were a proper function for our court, it is impossible for us to determine whether any particular piece of information was obtained or was not obtained by any particular Recorder in any particular detainee's case.

The original panel opinion offered a different rationale than the one the Chief Judge now proposes. It was that the detainee's counsel would need to see Government Information "to present an argument that the Recorder withheld exculpatory information." *Bismullah I*, 501 F.3d at 185-86. But the panel's remedy far outruns this rationale. Even if one accepted the exculpatory information rationale—which would require the court to disregard § 2112(b) and Rule 16(a)—this would at most lead to a conclusion that the record on review should consist only of the evidence before the Tribunal plus any exculpatory information the government has discovered. Yet the panel has required all information, exculpatory and incriminatory alike, bearing on the detainee's status to be deposited with the court and presumptively made available to defense counsel.

Why? We can be sure that the assembled information cannot be used in our judicial review of the Tribunal's status determination. And we can also be sure that its assembly and filing in this court, and potential sharing with private counsel, gives rise to a severe risk of a security breach. That is the position of the agencies charged with protecting the country against terrorist attacks, who warn that foreign intelligence services will cease cooperating with the United States if the panel

opinion stands. Their concerns deserve the attention of the full court on rehearing en banc.

One final point. Judge Garland votes against en banc, not because he thinks the case unimportant, but because he believes it is more important to advance our decision-making in order to assist the Supreme Court. Stmt. of Garland, J., at 1. We think that it is more important to decide the case correctly and that a correct decision would be of more assistance to the High Court.

For the foregoing reasons we dissent from the denial of rehearing en banc.

ADDENDUM

RANDOLPH, *Circuit Judge, concurring*:

* * *

The United States or its officers may be sued only if there is a waiver of sovereign immunity. *See, e.g., Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). We have held that the Alien Tort Act, whatever its meaning, does not itself waive sovereign immunity. *Industria Panificadora, S.A. v. United States*, 957 F.2d 886, 886 (D.C. Cir. 1992) (per curiam); *Sanchez-Espinoza*, 770 F.2d at 207; *see Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980). The detainees therefore rely on the waiver provision in the Administrative Procedure Act, 5 U.S.C. § 702, which states: "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity . . . shall not be dismissed

. . . on the ground that it is against the United States . . . ."

Although relying on the APA's waiver for agencies, the detainees do not identify which "agency" of the United States they have in mind. They have sued the President in each case, but the President is not an "agency" under the APA and the waiver of sovereign immunity thus does not apply to him. *See Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992); *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991). This leaves the military. The APA specifically excludes from its definition of "agency" certain functions, among which is "military authority exercised in the field in time of war or in occupied territory." 5 U.S.C. §§ 551(1)(G), 701(b)(1)(G); *see id.* §§ 553(a)(1) & 554(a)(4), exempting military "functions" from the APA's requirements for rulemaking and adjudication; *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371, 375 n.2 (2d Cir. 1968) (Friendly, J.). The district court ruled, in an alternative holding, that because of the military function exclusion, the APA does not waive sovereign immunity. *Rasul v. Bush*, 215 F. Supp. 2d 55, 64 n.10 (D.D.C. 2002). I believe this is correct.

Each of the detainees, according to their pleadings, was taken into custody by American armed forces "in the field in time of war." I believe they remain in custody "in the field in time of war." It is of no moment that they are now thousands of miles from Afghanistan. Their detention is for a purpose relating to ongoing military operations and they are being held at a military base outside the sovereign territory of the United States. The historical meaning of "in the field" was not restricted to the field of battle. It applied as well to

"organized camps stationed in remote places where civil courts did not exist," *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 274 (1960) (Whittaker, J., joined by Stewart, J., concurring in part and dissenting in part). To allow judicial inquiry into military decisions after those captured have been moved to a "safe" location would interfere with military functions in a manner the APA's exclusion meant to forbid. We acknowledged as much in *Doe v. Sullivan*, 938 F.2d 1370, 1380 (D.C. Cir. 1991), when then-Judge Ruth Bader Ginsburg stated for the court that the APA's military function exclusion applied to cases in which a court was asked to "review military commands made . . . in the aftermath of [ ] battle." It is also of no moment that the detainees were captured without Congress having declared war against any foreign state. "Time of war," as the APA uses it, is not so confined. The military actions ordered by the President, with the approval of Congress, are continuing; those military actions are part of the war against the al Qaeda terrorist network; and those actions constitute "war," not necessarily as the Constitution uses the word, but as the APA uses it. *See Campbell v. Clinton*, 203 F.3d 19, 29-30 (D.C. Cir. 2000) (Randolph, J., concurring in the judgment); *Mitchell v. Laird*, 488 F.2d 611, 613 (D.C. Cir. 1973). The detainees are right not to contest this point. To hold that it is not "war" in the APA sense when the United States commits its armed forces into combat without a formal congressional declaration of war would potentially thrust the judiciary into reviewing military decision-making in places and times the APA excluded from its coverage.

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Al Odah v. United States, 321 F.3d 1134, 1149-50 (D.C. Cir. 2003) (Randolph, J., concurring).

BROWN, *Circuit Judge*, dissenting from the denial of rehearing en banc: I appreciate the panel's efforts to clarify the Government's production burden in these CSRT reviews. The panel assumes the phrase "reasonably available" adequately defines the scope of the record because that phrase comes from the CSRT regulations. However, because the record so defined does not arise naturally from the proceedings, the panel may have left much to litigate. The Government is clearly uncertain about what information is "reasonably available," and is searching laboriously through "all relevant federal agencies" to make sure it gathers at least that much information. Pet. at 10. The panel has, naturally, refused to opine on whether the results of such an exhaustive search are reasonably available, *Bismullah v. Gates*, 503 F.3d 137, 141 n.3 (D.C. Cir. 2007) (denial of panel rehearing) (*Bismullah II*), but it seems to think that too intensive a search would be unreasonable, *see id.* at 142. The panel avers that it did not require "[a] search for information without regard to whether it is 'reasonably available.'" *Id.* at 141. But reliance on this sort of verbal formulation may confuse rather than clarify the obligation. Using the phrase "reasonably available" provides not a process-based definition, but an abstract legal standard. If the Government must populate the record based on this standard, it will have to conduct a new search for materials that satisfy it. Under the panel's order, the record may be congruent with the universe of information identified by the regulations, but it bears no direct relationship to the CSRT process—or any process at all. Although the panel might

have been right to reject the Government's offer of only the record that a CSRT considered, that version of the record is at least the definite product of a process that actually happened.[1] The likely result of relying on a theoretical record will be continued litigation over the inclusion or exclusion of various pieces of information, so that any review of the merits of these cases will be substantially delayed. This would be fair to neither the Government nor the detainees.

The denial of rehearing has generated four separate opinions disputing the proper scope of production; this continuing debate suggests the court has not yet found the right paradigm. Although we strain for familiar analogies to guide us, none of them is apt, because they all miss a central point: CSRTs are not adversarial proceedings. Detainees are not represented by advocates, but only by Personal Representatives whose sole duty is to assist, not defend, them. Conversely, the Recorders and the CSRTs have an obligation, under the procedures, to find and examine exculpatory evidence. That being so, it seems improbable that the Government need turn over only the Record of Proceedings compiled after the CSRT, as it originally urged, *Bismullah v. Gates*, 501 F.3d 178, 185 (D.C. Cir. 2007) (*Bismullah I*). On the other hand, to demand everything means engaging this court in *de novo* review of the CSRTs, as the panel ac-

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[1] As a corollary, reconvening a CSRT, as the panel proposes, *Bismullah II*, 503 F.3d at 141, will only postpone the issue, because the abstract set of Government Information will have no relation to that proceeding either. The court will still review whether the Recorder for the new panel gathered all reasonably available information. *Bismullah I*, 501 F.3d at 185; Stmt. of Ginsburg, C.J., at 5–6.

knowledges. *See Bismullah II*, 503 F.3d at 139–40. Is such review what Congress intended when it passed the Detainee Treatment Act?

Congress mandated this court to review the CSRTs. An adversarial appeal from a nonadversarial hearing is an unfamiliar process in this country, but it is common in other parts of the world. Indeed, since the military's prisoner-of war procedures were developed to implement international law, Army Reg. 190-8 §§ 1-1(b)(3), 1-6(a) (citing Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316), it is conceivable that they were intentionally modeled on traditional inquisitorial procedures. Many aspects seem similar, including the role of the Recorder as both judge and investigator. Not only does he prepare the "official record of the Tribunal's decision," Memo. from the Sec'y of the Navy on Implementation of Combatant Status Review Tribunal Procedures Encl. 2 § C(10) (July 29, 2004); he also gathers the Government Information, which includes all "reasonably available information . . . bearing on . . . whether the detainee" is an enemy combatant, *id.* Encl. 1 § E(3), including evidence both for and against that determination. *Cf.* JACQUELINE HODGSON, FRENCH CRIMINAL JUSTICE 30 (2005) (investigating magistrate must "gather[] evidence which might exculpate as well as incriminate the suspect"). Most important for this case, a civil-law inquisition prepares a well-defined record for review, consisting of the material that the magistrate actually gathered. Bron McKillop, *Anatomy of a French Murder Case*, 45 AM. J. COMP. L. 527, 544-46 (1997). Naturally, this record contains significantly less infor-

mation than what the magistrate *could* have gathered because it was available.

My point is not to hold out continental criminal procedure as the perfect model for CSRT review, although it may be the closest (and may actually have been the original) model for the military's prisoner-of-war tribunals. Nor, of course, is it a source of law, although it can be a useful source of ideas given that the military's prisoner-of-war regulations expressly advert to international law. Nevertheless, this court could define the record in other ways than the "all" required by the panel or the "nothing" offered by the Government, and this definition is one of a set of decisions this court should make about how we are to conduct this novel form of review.

I am now convinced we should have begun by discussing the problems much more thoroughly *en banc*. Accordingly, I dissent from the denial of rehearing.

APPENDIX D

1. Section 1005 of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739, provides, in pertinent part:

TITLE X—MATTERS RELATING TO DETAINEE

SEC. 1005. PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES.

(a) SUBMITTAL OF PROCEDURES FOR STATUS REVIEW OF DETAINEES AT GUANTANAMO BAY, CUBA, AND IN AFGHANISTAN AND IRAQ.—

(1) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committee on Armed Services and the Committee on the Judiciary of the Senate and the Committee on Armed Services and the Committee on the Judiciary of the House of Representatives a report setting forth—

(A) the procedures of the Combatant Status Review Tribunals and the Administrative Review Boards established by direction of the Secretary of Defense that are in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay or to provide an annual review to determine the need to continue to detain an alien who is a detainee; and

(B) the procedures in operation in Afghanistan and Iraq for a determination of the status of aliens detained in the custody or under the physi-

cal control of the Department of Defense in those countries.

(2) DESIGNATED CIVILIAN OFFICIAL.—The procedures submitted to Congress pursuant to paragraph (1)(A) shall ensure that the official of the Department of Defense who is designated by the President or Secretary of Defense to be the final review authority within the Department of Defense with respect to decisions of any such tribunal or board (referred to as the "Designated Civilian Official") shall be a civilian officer of the Department of Defense holding an office to which appointments are required by law to be made by the President, by and with the advice and consent of the Senate.

(3) CONSIDERATION OF NEW EVIDENCE.—The procedures submitted under paragraph (1)(A) shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee.

(b) CONSIDERATION OF STATEMENTS DERIVED WITH COERCION.—

(1) ASSESSMENT.—The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess—

(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and

(B) the probative value (if any) of any such statement.

(2) APPLICABILITY.—Paragraph (1) applies with respect to any proceeding beginning on or after the date of the enactment of this Act.

(c) REPORT ON MODIFICATION OF PROCEDURES.—The Secretary of Defense shall submit to the committees specified in subsection (a)(1) a report on any modification of the procedures submitted under subsection (a). Any such report shall be submitted not later than 60 days before the date on which such modification goes into effect.

(d) ANNUAL REPORT.—

(1) REPORT REQUIRED.—The Secretary of Defense shall submit to Congress an annual report on the annual review process for aliens in the custody of the Department of Defense outside the United States. Each such report shall be submitted in unclassified form, with a classified annex, if necessary. The report shall be submitted not later than December 31 each year.

(2) ELEMENTS OF REPORT.—Each such report shall include the following with respect to the year covered by the report:

(A) The number of detainees whose status was reviewed.

(B) The procedures used at each location.

(e) JUDICIAL REVIEW OF DETENTION OF ENEMY COMBATANTS.—

(1) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by adding at the end the following:

"(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

"(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

"(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

"(A) is currently in military custody; or

"(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.".

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION.—

(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Re-

view Tribunal that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien—

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

(D) TERMINATION ON RELEASE FROM CUSTODY.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.

(3) REVIEW OF FINAL DECISIONS OF MILITARY COMMISSIONS.—

(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

(B) GRANT OF REVIEW.—Review under this paragraph—

(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or

(ii) with respect to any other case, shall be at the discretion of the United States

Court of Appeals for the District of Columbia Circuit.

(C) LIMITATION ON APPEALS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien—

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

(D) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

(4) RESPONDENT.—The Secretary of Defense shall be the named respondent in any appeal to the United States Court of Appeals for the District of Columbia Circuit under this subsection.

(f) CONSTRUCTION.—Nothing in this section shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States.

(g) UNITED STATES DEFINED.—For purposes of this section, the term "United States", when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration and Nationality Act and, in particular, does not include the United States Naval Station, Guantanamo Bay, Cuba.

(h) EFFECTIVE DATE.—

(1) IN GENERAL.—This section shall take effect on the date of the enactment of this Act.

(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS.—Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

2. Section 2112 of Title 28 of the United States Code provides, in pertinent part:

Record on review and enforcement of agency orders

* * * * *

(b) The record to be filed in the court of appeals in such a proceeding shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned, or such portions thereof (1) as the rules prescribed under the authority of section 2072 of this title may require to be included therein, or (2) as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court in any such proceeding may consistently with the rules prescribed under the authority of section 2072 of this title designate to be included therein, or (3) as the court upon motion of a party or, after a prehearing conference, upon its own motion may by order in any such proceeding designate to be included therein. Such a stipulation or order may provide in an appropriate case that no record need be filed in the court of appeals. If, however, the correctness of a finding of fact by the agency, board, commission, or officer is in question all of the evidence before the agency, board, commission, or officer shall be included in the record except such as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written

stipulation filed with the agency, board, commission, or officer concerned or in the court agree to omit as wholly immaterial to the questioned finding. If there is omitted from the record any portion of the proceedings before the agency, board, commission, or officer concerned or in the court agree to omit as wholly immaterial to the questioned finding. If there is omitted from the record any portion of the proceedings before the agency, board, commission, or officer which the court subsequently determines to be proper for it to consider to enable it to review or enforce the order in question the court may direct that such additional portion of the proceedings be filed as a supplement to the record. The agency, board, commission, or officer concerned may, at its option and without regard to the foregoing provisions of this subsection, and if so requested by the petitioner for review or respondent in enforcement shall, file in the court the entire record of the proceedings before it without abbreviation.

3. Federal Rule of Appellate Procedure 16 provides, in pertinent part:

The Record on Review or Enforcement

(a) **Composition of the Record.** The record on review or enforcement of an agency order consists of:

(1) the order involved;

(2) any findings or report on which it is based; and

(3) the pleadings, evidence, and other parts of the proceedings before the agency.

APPENDIX E

DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON DC 20301-1010

[Seal Omitted]

7 Jul 2004

MEMORANDUM FOR THE SECRETARY OF THE NAVY

SUBJECT: Order Establishing Combatant Status Review Tribunal

This Order applies only to foreign nationals held as enemy combatants in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba ("detainees").

a. Enemy Combatant. For purposes of the Order, the term "enemy combatant" shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of reviews by officers of the Department of Defense.

b. Notice. Within ten days after the date of this Order, all detainees shall be notified of the opportunity to contest designation as an enemy combatant in the

proceeding described herein, of the opportunity to consult with and be assisted by a personal representative as described in paragraph (c), and of the right to seek a writ of habeas corpus in the courts of the United States.

c. Personal Representative. Each detainee shall be assigned a military officer, with the appropriate security clearance, as a personal representative for the purpose of assisting the detainee in connection with the review process described herein. The personal representative shall be afforded the opportunity to review any reasonably available information in the possession of the Department of Defense that may be relevant to a determination of the detainee's designation as an enemy combatant, including any records, determinations, or reports generated in connection with earlier determinations or reviews, and to consult with the detainee concerning that designation and any challenge thereto. The personal representative may share any information with the detainee, except for classified information, and may participate in the Tribunal proceeding as provided in paragraph (g)(4).

d. Tribunals. Within 30 days after the detainee's personal representative has been afforded the opportunity to review the reasonably available information in the possession of the Department of Defense and had an opportunity to consult with the detainee, a Tribunal shall be convened to review the detainee's status as an enemy combatant.

e. Composition of Tribunal. A Tribunal shall be composed of three neutral commissioned officers of the U.S. Armed Forces, each of whom possesses the appropriate security clearance and none of whom was involved

in the apprehension, detention, interrogation, or previous determination of status of the detainee. One of the members shall be a judge advocate. The senior member (in the grade of 0-5 and above) shall serve as President of the Tribunal. Another non-voting officer, preferable a judge advocate, shall serve as the Recorder and shall not be a member of the Tribunal.

f. Convening Authority. The Convening Authority shall be designated by the Secretary of the Navy. The Convening Authority shall appoint each Tribunal and its members, and a personal representative for each detainee. The Secretary of the Navy, with the concurrence of the General Counsel of the Department of Defense, may issue instructions to implement this Order.

g. Procedures.

(1) The Recorder shall provide the detainee in advance of the proceedings with notice of the unclassified factual basis for the detainee's designation as an enemy combatant.

(2) Members of the Tribunal and the Recorder shall be sworn. The Recorder shall be sworn first by the President of the Tribunal. The Recorder will then administer an oath, to faithfully and impartially perform their duties, to all members of the Tribunal to include the President.

(3) The record in each case shall consist of all the documentary evidence presented to the Tribunal. The Recorder's summary of all witness testimony, a written report of the Tribunal's decision, and a recording of the proceedings (except proceedings involving deliberation and voting by the members), which shall be preserved.

(4) The detainee shall be allowed to attend all proceedings, except for proceedings involving deliberation and voting by the members or testimony and other matters that would compromise national security if held in the presence of the detainee. The detainee's personal representative shall be allowed to attend all proceedings, except for proceedings involving deliberation and voting by the members of the Tribunal.

(5) The detainee shall be provided with an interpreter, if necessary.

(6) The detainee shall be advised at the beginning of the hearing of the nature of the proceedings and of the procedures accorded him in connection with the hearing.

(7) The Tribunal, through its Recorder, shall have access to and consider any reasonably available information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any reasonably available records, determinations, or reports generated in connection therewith.

(8) The detainee shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal. The Tribunal shall determine the reasonable availability of witnesses. If such witnesses are from within the U.S. Armed Forces, they shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would affect combat or support operations. In the case of witnesses who are not reasonably available, written statements, preferably sworn, may be submitted and considered as evidence.

(9) The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issue before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances. The Tribunal does not have the authority to declassify or change the classification of any national security information it reviews.

(10) The detainee shall have a right to testify or otherwise address the Tribunal in oral or written form, and to introduce relevant documentary evidence.

(11) The detainee may not be compelled to testify before the Tribunal.

(12) Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine in closed session by majority vote whether the detainee is properly detained as an enemy combatant. Preponderance of evidence shall be the standard used in reaching this determination, but there shall be a rebuttable presumption in favor of the Government's evidence.

(13) The President of the Tribunal shall, without regard to any other provision of the Order, have authority and the duty to ensure that all proceedings of or in relation to the Tribunal under this Order shall comply with Executive Order 12958 regarding national security information.

h. The Record. The Recorder shall, to the maximum extent practicable, prepare the record of the Tribunal

within three working days of the announcement of the Tribunal's decision. The record shall include those items described in paragraph (g)(3) above. The record will then be forwarded to the Staff Judge Advocate for the Convening Authority, who shall review the record for legal sufficiency and make a recommendation to the Convening Authority. The Convening Authority shall review the Tribunal's decision and, in accordance with this Order and any implementing instructions issuded by the Secretary of the Navy, may return the record to the Tribunal for further proceedings or approve the decision and take appropriate action.

i. Non-Enemy Combatant Determination. If the Tribunal determines that the detainee shall no longer be classified as an enemy combatant, the written report of its decision shall be forwarded directly to the Secretary of Defense or his designee. The Secretary or his designee shall so advise the Secretary of State , in order to permit the Secretary of State to coordinate the transfer of the detainee for release to the detainee's country of citizenship or other disposition consistent with domestic and international obligations and the foreign policy of the United States.

j. This Order is intended solely to improve management within the Department of Defense concerning its detention of enemy combatants at Guantanamo Bay Naval Base, Cuba, and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law, in equity, or otherwise by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

k. Nothing in the Order shall be construed to limit, impair, or otherwise affect the constitutional authority of the President as Commander in Chief or any authority granted by statute to the President or the Secretary of Defense.

This Order is effective immediately.

/s/ [ILLEGIBLE]

APPENDIX F

THE SECRETARY OF THE NAVY
WASHINGTON, D.C. 20350-1000
29 July 2004

[Logo Omitted]

MEMORANDUM FOR DISTRIBUTION

Subj: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba

Ref: (a) Deputy Secretary of Defense Order of July 7, 2004
(b) Convening Authority Appointment Letter of July 9, 2004

Encl: (1) Combatant Status Review Tribunal Process
(2) Recorder Qualifications, Roles and Responsibilities
(3) Personal Representative Qualifications, Roles and Responsibilities
(4) Combatant Status Review Tribunal Notice to Detainees
(5) Sample Detainee Election Form
(6) Sample Nomination Questionnaire
(7) Sample Appointment Letter for Combatant Status Review Tribunal Panel
(8) Combatant Status Review Tribunal Hearing Guide

(9) Combatant Status Review Tribunal Decision Report Cover Sheet

1. Introduction

By reference (a), the Secretary of Defense has established a Combatant Status Review Tribunal (CSRT) process to determine, in a fact-based proceeding, whether the individuals detained by the Department of Defense at the U.S. Naval Base Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation. The Secretary of the Navy has been appointed to operate and oversee this process.

The Combatant Status Review Tribunal process provides a detainee: the assistance of a Personal Representative; an interpreter if necessary; an opportunity to review unclassified information relating to the basis for his detention; the opportunity to appear personally to present reasonably available info[r]mation relevant to why he should not be classified as an enemy combatant; the opportunity to question witnesses testifying at the Tribunal: and, to the extent they are

Subj: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba

reasonably available, the opportunity to call witnesses on his behalf.

2. Authority

The Combatant Status Review Tribunal process was established by Deputy Secretary of Defense Order dated July 7, 2004 (reference (a)), which designated the undersigned to operate and oversee the Combatant Status

Review Tribunal process. The Tribunals will be governed by the provisions of reference (a) and this implementing directive, which sets out procedures for Tribunals and establishes the position of Director, Combatant Status Review Tribunals. Reference (b) designates the Director, CSRT, as the convening authority for the Tribunal process.

3. Implementing Process

The Combatant Status Review Tribunal Process is set forth in enclosure (1). Enclosures (2) and (3) set forth detailed descriptions of the roles and responsibilities of the Recorder and Personal Representative respectively. Enclosure (4) is a Notice to detainees regarding the CSRT process. Enclosure (5) is a Sample Detainee Election Form. Enclosure (6) is a Sample Nominee Questionnaire for approval of Tribunal members, Recorders, and Personal Representatives. Enclosure (7) is an Appointment Letter that will be signed by the Director of CSRT as the convening authority. Enclosure (8) is a CSRT Hearing Guide. Tribunal decisions will be reported to the convening authority by means of enclosure (9). This implementing directive is subject to revision at any time.

/s/ ILLEGIBLE

CC:
Secretary of State
Secretary of Defense
Attorney General
Secretary of Homeland Security
Director, Central Intelligence Agency

Assistant to the President for National Security Affairs
Counsel to the President

Deputy Secretary of Defense
Secretary of the Army
Secretary of the Navy
Secretary of the Air Force
Chairman of the Joint Chiefs of Staff
Director, Federal Bureau of Investigation
Director of Defense Agencies
Director, DOD Office of Detainee Affairs

Combatant Status Review Tribunal Process

A. Organization

Combatant Status Review Tribunals (CSRT) will be administered by the Director, Combatant Status Review Tribunals. The Director will staff and structure the Tribunal organization to facilitate its operation. The CSRT staff will schedule Tribunal proceedings, provide for interpreter services, provide legal advice to the Director and to Tribunal panels, provide clerical assistance and other administrative support, ensure information security, and coordinate with other agencies as appropriate.

B. Purpose and Function

This process will provide a non-adversarial proceeding to determine whether each detainee in the control of the Department of Defense at the Guantanarno Bay Naval Base, Cuba, meets the criteria to be designated as an enemy combatant, defined in reference (a) as follows:

> An "enemy combatant" for purposes of this order shall mean an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Each detainee whose status will be reviewed by a Tribunal has previously been determined, since capture, to be an enemy combatant through multiple levels of review by military officers and officials of the Department of Defense.

The Director, CSRT, shall convene Tribunals pursuant to this implementing directive to conduct such proceedings as necessary to make a written assessment as to each detainee's status as an enemy combatant. Each Tribunal shall determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant.

Adoption of the procedures outlined in this directive is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

C. Combatant Status Review Tribunal Structure

(1) Each Tribunal shall be composed of a panel of three neutral commissioned officers of the U.S. Armed Forces convened to make determinations of enemy combatant status pursuant to this implementing directive. Each of the officers shall possess the appropriate security clearance and none of the officers appointed shall have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The senior member of each Tribunal shall be an officer serving in the grade of 0-6 and shall be its President. The other members of the Tribunal shall be officers in the grade of 0-4 and above. One of the officers appointed to the Tribunal shall be a judge advocate. All Tribunal members

have an equal vote as to a detainee's enemy combatant status.

(2) Recorder. Each Tribunal shall have a commissioned officer serving in the grade of 0-3 or above, preferably a judge advocate, appointed by the Director, CSRT, to obtain and present all relevant evidence to the Tribunal and to cause a record to be made of the proceedings. The Recorder shall have an appropriate security clearance and shall have no vote. The Recorder shall not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The role and responsibilities of the Recorder are set forth in enclosure (2).

(3) Personal Representative. Each Tribunal shall have a commissioned officer appointed by the Director, CSRT, to assist the detainee in reviewing all relevant unclassified information, in preparing and presenting information, and in questioning witnesses at the CSRT. The Personal Representative shall be an officer in the grade of 0-4 or above, shall have the appropriate security clearance, shall not be a judge advocate, and shall have no vote. The Personal Representative shall not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The role and responsibilities of the Personal Representative are set forth in enclosure (3).

(4) Legal Advisor. The Director, CSRT, shall appoint a judge advocate officer as the Legal Advisor to the Tribunal process. The Legal Advisor shall be available in person, telephonically, or by other means, to each Tribunal as an advisor on legal, evidentiary, procedural or other matters. In addition, the Legal Advisor shall be responsible for reviewing each Tribunal decision for legal sufficiency. The Legal Advisor shall have an appropriate security clearance and shall have no vote. The Legal Advisor shall also not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process.

(5) Interpreter. If needed, each Tribunal will have an interpreter appointed by the President of the Tribunal who shall be competent in English and a language understood by the detainee. The interpreter shall have no vote and will have an appropriate security clearance.

D. Handling of Classified Material

(1) All parties shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Tribunal, Recorder and Personal Representative shall coordinate with an Information Security Officer in the handling and safeguarding of classified material before, during and after the Tribunal proceeding.

(2) The Director, CSRT, and the Tribunal President have the authority and duty to ensure that all proceedings of, or in relation to, a Tribunal under this Order shall comply with Executive Order 12958 regarding national security information in all respects. Classified information may be used in the CSRT process with the concurrence of the originating agency. Classified information for which the originating agency declines to authorize for use in the CSRT process is not reasonably available. For any information not reasonably available, a substitute or certification will be requested from the originating agency as cited in paragraph E (3)(a) below.

(3) The Director, CSRT, the CSRT staff, and the participants in the CSRT process do not have the authority to declassify or change the classification of any classified information.

E. Combatant Status Review Tribunal Authority

The Tribunal is authorized to:

(1) Determine the mental and physical capacity of the detainee to participate in the hearing. This determination is intended to be the perception of a layperson, not a medical or mental health professional. The Tribunal may direct a medical or mental health evaluation of a detainee, if deemed appropriate. If a detainee is deemed physically or mentally unable to participate in the CSRT process, that detainee's case will be held as a Tr[i]bunal in which the detainee elected not to

participate. The Tribunal President shall ensure that the circumstances of the detainee's absence are noted in the record.

(2) Order U.S. military witnesses to appear and to request the appearance of civilian witnesses i[f,] in the judgment of the Tribunal President those witnesses are reasonably available as defined in paragraph G (9) of this enclosure.

(3) Request the production of such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings (cumulatively called hereinafter the "Government Information").

(a) For any relevant information not provided in response to a Tribunal's request, the agency holding the information shall provide either an acceptable substitute for the information requested or a certification to the Tribunal that none of the withheld information would support a determination that the detainee is not an enemy combatant. Acceptable substitutes may include an unclassified or, if not possible, a lesser classified, sum-

mary of the information; or a statement as to the relevant facts the information would tend to prove.

(4) Require each witness (other than the detainee) to testify under oath. The detainee has the option of testimony under oath or unsworn. Forms of the oath for Muslim and non-Muslim witnesses are in the Tribunal Hearing Guide (enclosure (8)). The Tribunal Recorder will administer the oath.

F. The Detainee's Participation in the CSRT Process

(1) The detainee may elect to participate in a Combatant Status Review Tribunal or may waive participation in the process. Such waiver shall be submitted to the Tribunal in writing by the detainee's Personal Representative and must be made after the Personal Representative has explained the Tribunal process and the opportunity of the detainee to contest this enemy combatant status. The waiver can be either an affirmative statement that the detainee declines to participate or can be inferred by the Personal Representative from the detainee's silence or actions when the Personal Representative explains the CSRT process to the detainee. The detainee's election shall be noted by the Personal Representative on enclosure (5).

(2) If a detainee waives participation in the Tribunal process, the Tribunal shall still review the de-

tainee's status without requiring the presence of the detainee.

(3) A detainee who desires to participate in the Tribunal process shall be allowed to attend all Tribunal proceedings except for proceedings involving deliberation and voting by the members and testimony or other matters that would compromise national security if held in the presence of the detainee.

(4) The detainee may not be compelled to testify or answer questions before the Tribunal other than to confirm his identity.

(5) The detainee shall not be represented by legal counsel but will be aided by a Personal Representative who may, upon the detainee's election, assist the detainee at the Tribunal. He shall be provided with an interpreter during the Tribunal hearing if necessary.

(6) The detainee may present evidence to the Tribunal, including the testimony of witnesses who are reasonably available and whose testimony is considered by the Tribunal to be relevant. Evidence on the detainee's behalf (other than his own testimony, if offered) may be presented in documentary form and through written statements, preferably sworn.

(7) The detainee may present oral testimony to the Tribunal and may elect to do so under oath or

affirmation or as unsworn testimony. If the detainee testifies, either under oath or unsworn, he may be questioned by the Recorder, Personal Representative, or Tribunal members, but may not be compelled to answer questions before the Tribunal.

(8) The detainee's Personal Representative shall be afforded the opportunity to review the Government Information, and to consult with the detainee concerning his status as an enemy combatant and any challenge thereto. The Personal Representative may share the unclassified portion of the Government Information with the detainee.

(9) The detainee shall be advised of the foregoing by his Personal Representative before the Tribunal is convened, and by the Tribunal President at the beginning of the hearing.

G. Tribunal Procedures

(1) By July 17, 2004, the convening authority was required to notify each detainee of the opportunity to contest his status as an enemy combatant in the Combatant Status Review Tribunal process, the opportunity to consult with and be assisted by a Personal Representative, and of the jurisdiction of the courts of the United States to entertain a habeas corpus petition filed on the detainee's behalf. The English language version of this Notice to Detainees is at enclosure (4). All detainees were so notified July 12-14, 2004.

(2) An officer appointed as a Personal Representative will meet with the detainee and, through an interpreter if necessary, explain the nature of the CSRT process to the detainee, explain his opportunity to personally appear before the Tribunal and present evidence, and assist the detainee in collecting relevant and reasonably available information and in preparing for and presenting information to the CSRT.

(3) The Personal Representative will have the detainee make an election as to whether he wants to participate in the Tribunal process. Enclosure (5) is a Detainee Election Form. If the detainee elects not to participate, or by his silence or actions indicates that he does not want to participate, the Personal Representative will note this on the election form and this detainee will not be required to appear at his Tribunal hearing. The Director, CSRT, as convening authority, shall appoint a Tribunal as described in paragraph C (1) of this enclosure for all detainees after reviewing Nomination Questionnaires (enclosure (6)) and approving Tribunal panel members. Enclosure (7) is a sample Appointment Letter.

(4) The Director, CSRT, will schedule a Tribunal hearing for a detainee within 30 days after the detainee's Personal Representative has reviewed the Government Information, had an opportunity to consult with the detainee, and notified the detainee of his opportunity to contest his sta-

tus, even if the detainee declines to participate as set forth above. The Personal Representative will submit a completed Detainee Election Form to the Director, CSRT, or his designee when the Personal Representative has completed the actions above. The 30-day period to schedule a Tribunal will commence upon receipt of this form.

(5) Once the Director, CSRT, has scheduled a Tribunal, the President of the assigned Tribunal panel may postpone the Tribunal for good cause shown to provide the detainee or his Personal Representative a reasonable time to acquire evidence deemed relevant and necessary to the Tribunal's decision, or to accommodate military exigencies as presented by the Recorder.

(6) All Tribunal sessions except those relating to deliberation or voting shall be recorded on audiotape. Tribunal sessions where classified information is discussed shall be recorded on separate and properly marked audiotapes.

(7) Admissibility of Evidence. The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issues before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances.

(8) Control of Case. The President of the Tribunal is authorized to order the removal of any person from the hearing if that person is disruptive, uncooperative, or otherwise interferes with the Tribunal proceedings following a warning. In the case of the removal of the detainee from the Tribunal hearing, the detainee's Personal Representative shall continue in his role of assisting the detainee in the hearing.

(9) Availability of Witnesses. The President of the Tribunal is the decision authority on reasonable availability of witnesses.

(a) If such witnesses are from within the U.S. Armed Forces, they shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would adversely affect combat or support operations.

(b) If such witnesses are not from within the U.S. Armed Forces, they shall not be considered reasonably available if they decline properly made requests to appear at a hearing, if they cannot be contacted following reasonable efforts by the CSRT or if security considerations preclude their presence at a hearing. Non-U.S. Government witnesses will appear before the Tribunal at their own expense. Payment of expenses for U.S. Government witnesses will be coordi-

nated by the CSRT staff and the witness's organization.

(c) For any witnesses who do not appear at the hearing, the President of the Tribunal may allow introduction of evidence by other means such as e-mail, fax copies, and telephonic or video-telephonic testimony. Since either video-telephonic or telephonic testimony is equivalent to in-person testimony, the witness shall be placed under oath and is subject to questioning by the Tribunal.

(10) CSRT Determinations on Availability of Evidence. If the detainee requests witnesses or evidence deemed not reasonably available, the President of the Tribunal shall document the basis for that decision; to include, for witnesses, efforts undertaken to procure the presence of the witness and alternatives considered or used in place of that witness's in-person testimony.

(11) Burden of Proof. Tribunals shall determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant. There is a rebuttable presumption that the Government Evidence, as defined in paragraph H (4) herein, submitted by the Recorder to support a determination that the detainee is an enemy combatant, is genuine and accurate.

(12) Voting. The decisions of the Tribunal shall be determined by a majority of the voting members of the Tribunal. A dissenting member shall prepare a brief summary of the basis for his/her opinion, which shall be attached to the record forwarded for legal review. Only the Tribunal members shall be present during deliberation and voting.

H. Conduct Of Hearing

A CSRT Hearing Guide is attached at enclosure (8) and provides guidance on the conduct of the Tribunal hearing. The Tribunal's hearing shall be substantially as follows:

(1) The President shall call the Tribunal to order, and announce the order appointing the Tribunal (see enclosure (7)). The President shall also ensure that all participants are properly sworn to faithfully perform their duties.

(2) The Recorder shall cause a record to be made of the time, date, and place of the hearing, and the identity and qualifications of all participants. All proceedings shall be recorded on audiotape except those portions relating to deliberations and voting. Tribunal sessions where classified information is discussed shall be recorded on separate and properly marked audiotapes.

(3) The President shall advise the detainee of the purpose of the hearing, the detainee's opportu-

nity to present evidence, and of the consequences of the Tribunal's decision. In cases requiring an interpreter, the President shall ensure the detainee understands these matters through the interpreter.

(4) The Recorder shall present to the Tribunal such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant, including the circumstances of how the detainee was taken into the custody of U.S. or allied forces (the evidence so presented shall constitute the "Government Evidence"). In the event the Government Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also separately provide such evidence to the Tribunal.

(5) The Recorder shall present to the Tribunal an unclassified report summarizing the Government Evidence and any evidence to suggest that the detainee should not be designated as an enemy combatant. This report shall have been provided to the detainee's Personal Representative in advance of the Tribunal hearing.

(6) The Recorder shall call the witnesses, if any. Witnesses shall be excluded from the hearing except while testifying. An oath or affirmation shall be administered to each witness by the Recorder. When deemed necessary or appro-

priate, the Tribunal members can call witnesses who are reasonably available to testify or request the production of reasonably available documentary or other evidence.

(7) The detainee shall be permitted to present evidence and question any witnesses. The Personal Representative shall assist the detainee in obtaining unclassified documents and in arranging the presence of witnesses reasonably available and, if the detainee elects, the Personal Representative shall assist the detainee in the presentation of information to the Tribunal. The Personal Representative may, outside the presence of the detainee, present or comment upon classified information that bears upon the detainee's status if it would aid the Tribunal's deliberations.

(8) When deemed necessary and appropriate by any member of the Tribunal, the Tribunal may recess the Tribunal hearing to consult with the Legal Advisor as to any issues relating to evidence, procedure, or other matters. The President of the Tribunal shall summarize on the record the discussion with the Legal Advisor when the Tribunal reconvenes.

(9) The Tribunal shall deliberate in closed session with only voting members present. The Tribunal shall make its determination of status by a majority vote. The President shall direct a Tribunal member to document the Tribunal's

decision on the Combatant Status Review Tribunal Decision Report cover sheet (enclosure (9)), which will serve as the basis for the Recorder's preparation of the Tribunal record. The unclassified reasons for the Tribunal's decision shall be noted on the Tribunal Decision Report cover sheet, and should include, as appropriate, the detainee's organizational membership or affiliation with a governmental, military, or terrorist organization (e.g., Taliban, al Qaida, etc.). A dissenting member shall prepare a brief summary of the basis for his/ her opinion.

(10) Both documents shall be provided to the Recorder as soon as practicable after the Tribunal concludes.

I. Post-Hearing Procedures

(1) The Recorder shall prepare the record of the hearing and ensure that the audiotape is preserved and properly classified in conformance with security regulations.

(2) The detainee's Personal Representative shall be provided the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.

(3) The Recorder shall provide the completed record to the President of the Tribunal for signature and forwarding for legal review.

(4) In all cases the following items will be attached to the decision which, when complete and signed by the Tribunal President, shall constitute the record:

(a) A statement of the time and place of the hearing, persons present, and their qualifications;

(b) The Tribunal Decision Report cover sheet;

(c) The classified and unclassified reports detailing the findings of fact upon which the Tribunal decision was based;

(d) Copies of all documentary evidence presented to the Tribunal and summaries of all witness testimony. If classified material is part of the evidence submitted or considered by the Tribunal, the report will be properly marked and handled in accordance with all applicable security regulations; and

(e) A dissenting member's summary report, if any.

(5) The President of the Tribunal shall forward the Tribunal's decision and all supporting documents as set forth above to the Director, CSRT, acting as Convening Authority, via the CSRT Legal Advisor, within three working days of the date of the Tribunal decision. If additional time is needed, the President of the Tribunal shall request an extension from the Director, CSRT.

(6) The Recorder shall ensure that all audiotapes of the Tribunal hearing are properly marked with identifying information and classification markings, and stored in accordance with all applicable security regulations. These tapes may be reviewed and transcribed as necessary for the legal sufficiency and Convening Authority reviews.

(7) The CSRT Legal Advisor shall conduct a legal sufficiency review of all cases. The Legal Advisor shall render an opinion on the legal sufficiency of the Tribunal proceedings and forward the record with a recommendation to the Director, CSRT. The legal review shall specifically address Tribunal decisions regarding reasonable availability of witnesses and other evidence.

(8) The Director, CSRT, shall review the Tribunal's decision and may approve the decision and take appropriate action, or return the record to the Tribunal for further proceedings.

In cases where the Tribunal decision is approved and the case is considered final, the Director, CSRT, shall so advise the DoD Office of Detainee Affairs, the Secretary of State, and any other relevant U.S. Government agencies.

(9) If the Tribunal determines that the detainee shall no longer be classified as an enemy combatant, and the Director, CSRT, approves the Tribunal's decision, the Director, CSRT, shall forward the written report of the Tribunal's decision directly to the Secretary of the Navy. The Secretary of the Navy shall so advise the DoD Office of Detainee Affairs, the Secretary of State, and any other relevant U.S. Government agencies, in order to permit the Secretary of State to coordinate the transfer of the detainee with representatives of the detainee's country of nationality for release or other disposition consistent with applicable laws. In these cases the Director, CSRT, will ensure coordination with the Joint Staff with respect to detainee transportation issues.

(10) The detainee shall be notified of the Tribunal decision by the Director, CSRT. If the detainee has been determined to no longer be designated as an enemy combatant, he shall be notified of the Tribunal decision upon finalization of transportation arrangements or at such earlier time as deemed appropriate by the Commander, JTF-GTMO.

Recorder Qualifications, Roles and Responsibilities

A. Qualifications of the Recorder

(1) For each case, the Director, CSRT, shall select a commissioned officer in the grade of 0-3 or higher, preferably a judge advocate, to serve as a Recorder.

(2) Recorders must have at least a TOP SECRET security clearance. The Director shall ensure that only properly cleared officers are assigned as Recorders.

B. Roles of the Recorder

(1) Subject to section C (I), below, the Recorder has a duty to present to the CSRT such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant, including the circumstances of how the detainee was taken into the custody of U.S. or allied forces (the "Government Evidence"). In the event the Government Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also provide such evidence to the Tribunal.

(2) The Recorder shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Recorder shall coordinate with an

Information Security Officer (ISO) in the handling and safeguarding of classified material before, during, and following the Tribunal process.

C. Responsibilities of the Recorder

(1) For each assigned detainee case under review, the Recorder shall obtain and examine the Government Information as defined in paragraph E (3) of enclosure (1).

(2) The Recorder shall draft a proposed unclassified summary of the relevant evidence derived from the Government Information.

(3) The Recorder shall ensure appropriate coordination with original classification authorities for any classified information presented that was used in the preparation of the proposed unclassified summary.

(4) The Recorder shall permit the assigned Personal Representative access to the Government Information and will provide the unclassified summary to the Personal Representative in advance of the Tribunal hearing.

(5) The Recorder shall ensure that coordination is maintained with Joint Task Force-Guantanamo Bay and the Criminal Investigative Task Force to deconflict any other ongoing activities and arrange for detainee movements and security.

(6) The Recorder shall present the Government Evidence orally or in documentary form to the Tribunal. The Recorder shall also answer questions, if any, asked by the Tribunal.

(7) The Recorder shall administer an appropriate oath to the Tribunal members, the Personal Representative, the paralegal/reporter, the interpreter, and all witnesses (including the detainee if he elects to testify under oath)..

(8) The Recorder shall prepare a Record of Proceedings, and, if applicable, a record of the dissenting member's report. The Record of Proceedings should include:

(a) A statement of the time and place of the hearing, persons present, and their qualifications;

(b) The Tribunal Decision Report cover sheet;

(c) The classified and unclassified reports detailing the findings of fact upon which the Tribunal decision was based;

(d) Copies of all documentary evidence presented to the Tribunal and summaries of all witness testimony. If classified material is part of the evidence submitted or considered by the Tribunal, the report

will be properly marked and handled in accordance with applicable security regulations; and

(e) A dissenting member's summary report, if any.

(9) The Recorder shall provide the detainee's Personal Representative the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.

(10) The Recorder shall submit the completed Record of Proceedings to the President of the Tribunal who shall sign and forward it to the Director, CSRT via the CSRT Legal Advisor. Once signed by the Tribunal President, the completed record is considered the official record of the Tribunal's decision.

(11) The Recorder shall ensure that all audiotapes of the Tribunal hearing are properly marked with identifying information and classification markings, and stored in accordance with applicable security regulations. These tapes are considered part of the case record and may be reviewed and transcribed as necessary for the legal sufficiency and convening authority reviews.

Personal Representative Qualifications, Roles and Responsibilities

A. Qualifications of Personal Representative

(1) For each case, the Director, CSRT, shall select a commissioned officer serving in the grade of 0-4 or higher to serve as a Personal Representative. The Personal Representative shall not be a judge advocate.

(2) Personal Representatives must have at least a TOP SECRET security clearance. The Director shall ensure that only properly cleared officers are assigned as Personal Representatives.

B. Roles of the Personal Representative

(1) The detainees were notified of the Tribunal process per reference (a). When detailed to a detainee's case the Personal Representative shall further explain the nature of the CSRT process to the detainee, explain his opportunity to present evidence and assist the detainee in collecting relevant and reasonably available information and in preparing and presenting information to the Tribunal.

(2) The Personal Representative shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Personal Representative shall coordinate with an Information Security Officer (ISO) in the handling and safeguarding

of classified material before, during, and after the Tribunal process.

C. Responsibilities of the Personal Representative

(1) The Personal Representative is responsible for explaining the nature of the CSRT process to the detainee. Upon first contact with the detainee, the Personal Representative shall explain to the detainee that no confidential relationship exists or may be formed between the detainee and the Personal Representative. The Personal Representative shall explain the detainee's opportunity to make a personal appearance before the Tribunal. The Personal Representative shall request an interpreter, if needed, to aid the detainee in making such appearance and in preparing his presentation. The Personal Representative shall explain to the detainee that he may be subject to questioning by the Tribunal members, but he cannot be compelled to make any statement or answer any questions. Paragraph D, below, provides guidelines for the Personal Representative meeting with the enemy combatant prior to his appearance before the Tribunal.

(2) After the Personal Representative has reviewed the Government Information, had an opportunity to consult with the detainee, and notified the detainee of his opportunity to contest his status, even if the detainee declines to participate as set forth above, the Personal Representative shall complete a Detainee El-

ection Form (enclosure (5)) and provide this form to the Director, CSRT.

(3) The Personal Representative shall review the Government Evidence that the Recorder plans to present to the CSRT and shall permit the Recorder to review documentary evidence that will be presented to the CSRT on the detainee's behalf.

(4) Using the guidelines set forth in paragraph D, the Personal Representative shall meet with the detainee, using an interpreter if necessary, in advance of the CSRT. In no circumstance shall the Personal Representative disclose classified information to the detainee.

(5) If the detainee elects to participate in the Tribunal process, the Personal Representative shall present information to the Tribunal if the detainee so requests. The Personal Representative may, outside the presence of the detainee, comment upon classified information submitted by the Recorder that bears upon the presentation made on the detainee's behalf, if it would aid the Tribunal's deliberations.

(6) If the detainee elects not to participate in the Tribunal process, the Personal Representative shall assist the detainee by presenting information to the Tribunal in either open or closed sessions and may, in closed sessions, comment upon classified information submitted by the

Recorder that bears upon the detainee's presentation, if it would aid the Tribunal's deliberations.

(7) The Personal Representative shall answer questions, if any, asked by the Tribunal.

(8) The Personal Representative shall be provided the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.

D. Personal Representative Guidelines for Assisting the Enemy Combatant

In discussing the CSRT process with the detainee and completing the Detainee Election Form, the Personal Representative shall use the guidelines provided below to assist the detainee in preparing for the CSRT:

> You have already been advised that a Combatant Status Review Tribunal has been established by the United States government to review your classification as an enemy combatant.
>
> A Tribunal of military officers shall review your case in "x" number of days [or other time frame as known], and I have been assigned to ensure you understand this process. The Tribunal shall review your case file, offer you an opportunity to

speak on your own behalf if you desire, and ask questions. You also can choose not to appear at the Tribunal hearing. In that case I will be at the hearing and will assist you if you want me to do so.

You will be provided with an opportunity to review unclassified information that relates to your classification as an enemy combatant. I will be able to review additional information that is classified. I can discuss the unclassified information with you.

You will be allowed to attend all Tribunal proceedings, except for proceedings involving deliberation and voting by the members, and testimony or other matters that would compromise U.S. national security if you attended. You will not be forced to attend, but if you choose not to attend, the Tribunal will be held in your absence and I will attend.

You will have the opportunity to question witnesses testifying at the Tribunal.

You will have the opportunity to present evidence to the Tribunal, including calling witnesses to testify on your behalf if those witnesses are reasonably available. If a witness is not considered by the Tribunal as reasonably available to testify in person, the Tribunal can consider evidence submitted by telephone, written statements, or other means rather than having a witness testify in person. I am available to assist you in gathering and presenting these materials, should you desire to

do so. After the hearing, the Tribunal shall determine whether you should continue to be designated as an enemy combatant.

I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing. None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing.

I am available to assist you in preparing an oral or written presentation to the Tribunal should you desire to do so. I am also available to speak for you at the hearing if you wish that kind of assistance.

Do you understand the process or have any questions about it?

The Tribunal is examining one issue: whether you are an enemy combatant against the United States or its coalition partners. Any information you can provide to the Tribunal relating to your activities prior to your capture is very important in answering this question. However, you may not be compelled to testify or answer questions at the Tribunal hearing.

Do you want to participate in the Tribunal process and appear before the Tribunal?

Do you wish to present information to the Tribunal or have me present information for you?

Is there anyone here in the camp or elsewhere who can testify on your behalf regarding your capture or status?

Do you want to have anyone else submit any information to the Tribunal regarding your status? [If so,] how do I contact them? If feasible and you can show the Tribunal how the information is relevant to your case, the Tribunal will endeavor to arrange for evidence to be provided by other means such as mail, e-mail, faxed copies, or telephonic or video-telephonic testimony.

Do you have any questions?

Combatant Status Review Tribunal

Notice to Detainees*

You are being held as an enemy combatant by the United States Armed Forces. An enemy combatant is an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. The definition includes any person who has committed a belligerent act or has directly supported such hostilities.

The U.S. Government will give you an opportunity to contest your status as an enemy combatant. Your case will go before a Combatant Status Review Tribunal, composed of military officers. This is not a criminal trial

and the Tribunal will not punish you, but will determine whether you are properly held. The Tribunal will provide you with the following process:

1. You will be assigned a military officer to assist you with the presentation of your case to the Tribunal. This officer will be known as your Personal Representative. Your Personal Representative will review information that may be relevant to a determination of your status. Your Personal Representative will be able to discuss that information with you, except for classified information.

2. Before the Tribunal proceeding, you will be given a written statement of the unclassified factual basis for your classification as an enemy combatant.

3. You will be allowed to attend all Tribunal proceedings, except for proceedings involving deliberation and voting by the members, and testimony or other matters that would compromise U.S. national security if you attended. You will not be forced to attend, but if you choose not to attend, the Tribunal will be held in your absence. Your Personal Representative will attend in either case.

4. You will be provided with an interpreter during the Tribunal hearing if necessary.

5. You will be able to present evidence to the Tribunal, including the testimony of witnesses. If

those witnesses you propose are not reasonably available, their written testimony may be sought. You may also present written statements and other documents. You may testify. before the Tribunal but will not be compelled to testify or answer questions.

As a matter separate from these Tribunals, United States courts have jurisdiction to consider petitions brought by enemy combatants held at this facility that challenge the legality of their detention. You will be notified in the near future what procedures are available should you seek to challenge your detention in U.S. courts. Whether or not you decide to do so, the Combatant Status Review Tribunal will still review your status as an enemy combatant.

If you have any questions about this notice, your Personal Representative will be able to answer them.

[*Text of Notice translated, and delivered to detainees 12-14 July 2004]

Sample Detainee Election Form

Date/Time: _____

ISN#:_____

Personal Representative: _____

[Name/Rank]

Translator Requires? _____ Language? _____

CSRT Procedures Read to Detainee or Written Copy Read by Detainee? _____

_____

Detainee Election:

☐ Wants to Participate in Tribunal

☐ Wants Assistance of Personal Representative

☐ Affirmatively Declines to Participate in Tribunal

☐ Uncooperative or Unresponsive

Personal Representative Comments:

_____

_____

_____

_____

_____

_____

_____

Personal Representative

SAMPLE NOMINATION QUESTIONNAIRE

Department of Defense
Director, Combatant Status Review Tribunals

[Seal Omitted]

As a candidate to become a Combatant Status Review Tribunal member, Recorder, or Personal Representative, please complete the following questionnaire and provide it to the Director, Combatant Status Review Tribunal (CSRT). Because of the sensitive personal information requested, no copy will be retained on file outside of the CSRT.

1. Name (Last, First MI) _____ 2. Rank/Grade ____

3. Date of Rank _____4. Service_____ 5. Active Duty Service Date _____

6. Desig/MOS _____ 7. Date Current Tour Began: _____

8. Security Clearance Level _____ 9. Date of clearance: _____

10. Military Award/ Decorations: _____

_____

11. Current Duty Position _____ 12. Unit: _____

13. Date of Birth _____ 14. Gender ____ 15. Race or Ethnic Origin _____

16. Civilian Education. College/Vocational/Civilian Professional School: _____

17. Date graduated or dates attended (and number of years), school, location, degree/major:_____

_____

_____

18. Military Education. Dates attended, school/course title._____

_____

_____

19. Duty Assignments. Last four assignments, units, and dates of assignments. _____

_____

_____

20. Have you had any relative or friend killed or wounded in Afghanistan or Iraq? _____ Explain. ___

_____

_____

_____

21. Have you had any close relative or friend killed, wounded, or impacted by the events of September 11, 2001? _____Explain. _____

_____

_____

22. Have you ever been in an assignment related to enemy prisoners of war or enemy combatants, to include the apprehension, detention, interrogation, or previous determination of status of a detainee at Guantanamo Bay? _____ Explain. _____

_____

_____

23. Do you believe you may be disqualified to serve as a Tribunal member, Recorder, or Personal Representative for any reason? ___Explain. _____

_____

_____

_____

24. Your name or image as well as information related to the enemy combatant may be released to the public in conjunction with the Combatant Status Review Tribunal process. Could this potential public affairs release affect your ability to objectively serve in any capacity in the Tribunal process? Y/N ____Explain. _____

_____

_____

SIGNATURE OF OFFICER: _____DATE: _____

Approve ___ Disapprove ____ Director, CSRT

Sample Appointment Letter for Combatant Status Review Tribunal Panel

[Seal Omitted] ser

Department of Defense

Director, Combatant Status Review Tribunals

From: Director, Combatant Status, Review Tribunals

Subj: APPOINTMENT OF COMBATANT STATUS REVIEW TRIBUNAL

Ref: (a) Convening Authority Appointment Letter of 7 July 2004

By the authority given to me in reference (a), a Combatant Status Review Tribunal established by DCN XXX" Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba" is hereby convened. It shall hear such cases as shall be brought before it without further action of referral or otherwise.

The following commissioned officers shall serve as members of the Tribunal:

MEMBERS:

XXX, 999-99-9999; President*

YYY, 999-99-9999; Member*

ZZZ, 999-99-9999; Member*

J.M. MCGARRAH

RADM, CEC, USNR,

[* The Order should note which member is the Judge Advocate required to be on the Tribunal.]

Combatant Status Review Tribunal Hearing Guide

RECORDER: All rise. (The Tribunal enters)

[In Tribunal sessions where the detainee has waived participation, the Tribunal can generally omit the italicized portions.]

PRESIDENT: This hearing shall come to order.

RECORDER: This Tribunal is being conducted at [Time/Date] on board Naval Base Guantanamo Bay, Cuba. The following personnel are present:

_____, President

_____, Member

_____, Member

_____, Personal Representative

_____, Interpreter

_____, Reporter/ Paralegal, and

_____, Recorder

[Rank/Name] is the Judge Advocate member of the Tribunal.

PRESIDENT: The Recorder will be sworn. Do you, (name and rank of the Recorder) swear (or affirm) that you will faithfully perform the duties assigned in this Tribunal (so help you God)?

RECORDER: I do.

PRESIDENT: The reporter/paralegal will now be sworn.

RECORDER: Do you (name and rank of reporter/paralegal) swear or affirm that you will faithfully discharge your duties assigned in this tribunal?

REPORTER/
PARALEGAL: I do.

PRESIDENT: *The interpreter will be sworn. [If needed for witness testimony when detainee not present]*

RECORDER: *Do you swear (or affirm) that you will faithfully perform the duties of interpreter in the case now hearing (so help you God)?*

INTERPRETER: *I do.*

PRESIDENT: *We will take a brief recess while the detainee is brought into the room.*

RECORDER: *All Rise.*

[Tribunal members depart, followed by the Recorder, Personal Representative, Interpreter, and Court Reporter. The detainee is brought into the room. All participants except the Tribunal members return to the Tribunal room.]

RECORDER: *All Rise. [The Tribunal members enter the room.]*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: This hearing will come to order. You may be seated.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: (NAME OF DETAINEE), this Tribunal is convened by order of the Director, Combatant Status Review Tribunals under the provisions of his Order of XX July 2004. It will determine whether *you [or Name of Detainee]* meet the criteria to be designated as an enemy combatant against the United States or its allies *or* otherwise meet the criteria to be designated as an enemy combatant.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: This Tribunal shall now be sworn. All rise.

INTERPRETER: *(TRANSLATION OF ABOVE).*

[All persons in the room stand while Recorder administers the oath. Each voting member raises his or her right hand as the Recorder administers the following oath]

RECORDER: Do you swear (affirm) that you will faithfully perform your duties as a member of this Tribunal; that you

will impartially examine and inquire into the matter now before you according to your conscience, and the laws and regulations provided; that you will make such findings of fact and conclusions as are supported by the evidence presented; that in determining those facts, you will use your professional knowledge, best judgment, and common sense; and that you will make such findings as are appropriate according to the best of your understanding of the rules, regulations, and laws governing this proceeding, and guided by your concept of justice (so help you God)?

MEMBERS OF TRIBUNAL: I do.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: The Recorder will now administer the oath to the Personal Representative.

INTERPRETER: (TRANSLATION OF ABOVE).

[The Tribunal members lower their hands but remain standing while the following oath is administered to the Personal Representative:]

RECORDER: Do you swear (or affirm) that you will faithfully perform the duties of Personal Representative in this Tribunal (so help you God)?

PERSONAL REPRESENTATIVE: I do.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: *Please be seated. The Reporter, Recorder, and Interpreter have previously been sworn. This Tribunal hearing shall come to order.*

[All personnel resume their seats.]

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: *(NAME OF DETAINEE), you are hereby advised that the following applies during this hearing:*

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may be present at all open sessions of the Tribunal. However, if you become disorderly, you will be removed from the hearing, and the Tribunal will continue to hear evidence.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may not be compelled to testify at this Tribunal. However, you may testify if you wish to do so. Your testimony can be under oath or unsworn.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may have the assistance of a Personal Representative at the hearing. Your assigned Personal Representative is present.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may present evidence to this Tribunal, including the testimony of witnesses who are reasonably available. You may question witnesses testifying at the Tribunal.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may examine documents or statements offered into evidence other than classified information. However, certain documents may be partially masked for security reasons.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: Do you understand this process?

INTERPRETER: (TRANSLATION OF ABOVE)

PRESIDENT: Do you have any questions concerning the Tribunal process?

INTERPRETER: (TRANSLATION OF ABOVE)

[In Tribunal sessions where the detainee has waived participation substitute:

PRESIDENT: [Rank/Name of Personal Representative] you have advised the Tribunal that [Name of Detainee] has elected to not participate in this Tribunal proceeding. Is that still the situation?

PERSONAL REPRESENTATIVE: Yes/No. [Explain].

PRESIDENT: Please provide the Tribunal with the Detainee Election Form marked as Exhibit D-a.]

[Presentation of Unclassified Information by Recorder and Detainee or his Personal Representative. Recorder evidence shall be marked in sequence R-1, R-2, etc. while evidence presented for the detainee shall be marked in sequence D-a, D-b, etc.]

[The Interpreter shall translate as necessary during this portion of the Tribunal.]

PRESIDENT: Recorder, please provide the Tribunal with the unclassified evidence.

RECORDER: I am handing the Tribunal what has previously been marked as Exhibit R-1, the unclassified summary of the evidence that relates to this detainee's status as an enemy combatant. A translated copy of this exhibit was provided to the Personal Representative in advance of this hearing for presentation to the detainee. In addition, I am handing to

the Tribunal the following unclassified exhibits, marked as Exhibit R-2 through R-x. Copies of these Exhibits have previously been provided to the Personal Representative.

PRESIDENT: Does the Recorder have any witnesses to present?

RECORDER: Yes/no.

If witnesses appear before the Tribunal, the Recorder shall administer an appropriate oath:

Form of Oath for a Muslim

Do you [Name], in the Name of Allah, the Most Compassionate, the Most Merciful, swear that your testimony before this Tribunal will be the truth?

Form of Oath or Affirmation for Others

Do you (swear) (affirm) that the statements you are about to make shall be the truth, the whole truth, and nothing but the truth (so help you God)?

INTERPRETER: (TRANSLATION AS NECESSARY)

[Witnesses may be questioned by the Tribunal members, the Recorder, the Personal Representative, or the detainee.]

RECORDER: Mr./Madam President, I have no further unclassified information for the Tribunal but request a closed Tribunal session at an appropriate time to present classified informa-

tion relevant to this detainee's status as an enemy combatant.

PRESIDENT: *[Name of detainee]* (or *Personal* Representative), *do you* (or does the detainee) want to present information to this Tribunal?

[If detainee not present, Personal Representative may present information to the Tribunal.]

INTERPRETER: (TRANSLATION OF ABOVE).

[If the detainee elects to make an oral statement:]

PRESIDENT: [Name of detainee] would you like to make your statement under oath?

INTERPRETER: (TRANSLATION OF ABOVE).

[After statement is completed:]

PRESIDENT: [Name of detainee] does that conclude your statement?

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: [Determines whether Tribunal members, Recorder, or Personal Representative have any questions for detainee.]

PRESIDENT: [Name of detainee] do you have any other evidence to present to this Tribunal?

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: All unclassified evidence having been provided to the Tribunal, this concludes this Tribunal session.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: (Name of detainee), you shall be notified of the Tribunal decision upon completion of the review of these proceedings by the convening authority in Washington, D.C.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: If the Tribunal determines that you should not be classified as an enemy combatant, you will be released to your home country as soon as arrangements can be made.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: If the Tribunal confirms your classification as an enemy combatant you shall be eligible for an Administrative Review Board hearing at a future date.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: That Board will make an assessment of whether there is continued reason to believe that you pose a threat to the United States or its allies in the ongoing armed conflict against terrorist organizations such as al Qaida and its affiliates and supporters or whether there

are other factors bearing upon the need for continued detention.

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *You will have the opportunity to be heard and to present information to the Administrative Review Board. You can present information from your family that might help you at the Board. You are encouraged to contact your family as soon as possible to begin to gather information that may help you.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *A military officer will be assigned at a later date to assist you in the Administrative Review Board process.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: This Tribunal hearing is adjourned.

RECORDER: All Rise. [If moving into Tribunal session in which classified material will be discussed add:] This Tribunal is commencing a closed session. Will everyone but the Tribunal members, Personal Representative, and, Reporter/Paralegal please leave the Tribunal room.

PRESIDENT: [When Tribunal room is ready for closed session.] You may be seated.

The Tribunal for [Name of detainee] is now reconvened without the detainee, being present to prevent a potential compromise of national security due to, the classified nature of the evidence to be considered. The Recorder will note the date and time of this session for the record.

[Closed Tribunal Session Commences, as necessary, with only properly cleared personnel present. Presentation of classified information by Recorder and, when appropriate, Personal Representative. Recorder evidence shall be marked in sequence R-1, R-2, etc. while evidence presented for the detainee shall be marked in sequence D-a, D-b, etc. All evidence will be properly marked with the security classification.]

PRESIDENT: This Tribunal session is adjourned and the Tribunal is closed for deliberation and voting.

RECORDER: Notes time and date when Tribunal closed.

[CLASSIFICATION]

Combatant Status Review Tribunal

Decision Report Cover Sheet

[CLASSIFICATION]: UNCLASSIFIED Upon Removal of Enclosure(s) (2) [and (3)]

TRIBUNAL PANEL: _____

ISN #: _____ DATE: _____

Ref: (a) Convening Order of XX YYY 2004

(b) CSRT Implementation Directive of XX July 2004

(c) DEPSECDEF Memo of 7 July 2004

Encl: (1) Unclassified Summary of Basis for Tribunal Decision (U)

(2) Classified Summary of Basis for Tribunal Decision (U)

(3) Copies of Documentary Evidence Presented (U)

This Tribunal was convened by references (a) and (b) to make a determinations to whether the detainee meets the criteria to be designated as an enemy combatant as defined in reference (c).

The Tribunal has determined that he (is) (is not) designated as an enemy combatant as defined in reference (c).

[If yes] In particular the Tribunal finds that this detainee is a member of, or affiliated with, _____ (al Qaida, Taliban, other), as more fully discussed below and in the enclosures.

Enclosure (1) provides an unclassified account of the basis for the Tribunal's decision, as summarized below. A detailed account of the evidence considered by the Tribunal and its findings of fact are contained in enclosure (2).

_____

_____

_____

_____

_____

(Rank, Name) President

APPENDIX G

Department of Defense
Office for the Administrative Review of
the Detention of Enemy Combatants (OARDEC)
at U.S. Naval Base Guantanamo Bay, Cuba
1010 Defense Pentagon, Washington, D.C. 20301-1010

OARDECINST 5421.1
7 May 2007

[Seal Omitted]

OARDEC INSTRUCTION 5421.1

Subj: PROCEDURE FOR REVIEW OF "NEW EVIDENCE" RELATING TO ENEMY COMBATANT (EC) STATUS

Ref: (a) Detainee Treatment Act of 2005 (DTA)
(b) Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba dated July 14, 2006
(c) Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba dated July 14, 2006

1. Purpose: This regulation creates a unified procedure for the submission of new evidence relating to a Guantanamo detainee's EC status, including those who do not receive ARB hearings.

a. Section 105(a)(3) of reference (a) provides that Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) procedures, outlined in references (b) and (c), for individuals detained by the Department of Defense at Guantanamo "shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee."

b. Enclosure (13) of reference (c) provides that new information relating to the enemy combatant status of a Guantanamo detainee presented at an ARB shall be brought to the attention of the Deputy Secretary of Defense (DSD). Under that memorandum, the Department reviews new evidence and may either direct that a CSRT convene to reconsider the basis of the detainee's EC status in light of the new information, or determine that the new information does not warrant review by a CSRT.

c. Certain detainees (such as those previously approved for transfer/release or those subject to military commission charges) are not provided ARB hearings.

2. Cancellation: This is the first instruction in this series; no cancellation clause will be used.

3. Initiation of a "New Evidence Review": A detainee or a person lawfully acting on the detainee's be-

half can submit evidence that is new and relates to the detainee's EC status by mailing it to:

Director, OARDEC
1010 Defense Pentagon
Room 3A730
Washington, DC 20301-1010.

a. If any such evidence is submitted by a detainee to his ARB, it will be forwarded to the above office, consistent with the DSD Memorandum on Revised Implementation of Administrative Review Procedures.

b. If an individual submitting information on a detainee's behalf has had access to classified material, it is the responsibility of that individual to follow all applicable information security regulations with respect to the handling of classified or otherwise protected information. These procedures do not absolve those individuals of that responsibility.

4. Definition of "New Evidence"

a. For purposes of these procedures, "new evidence" must meet the following two criteria:

(1) It must be factual information that was not previously presented to the detainee's CSRT, and

(2) It must be information that is material to the factual question of whether the detainee is an EC. Information will be deemed "material" if it creates a substantial likelihood that the "new evidence" would have altered the CSRT's prior determination that the detainee is an enemy combatant, as that term is defined by Deputy Secretary of Defense Order of July 7, 2004,

and the Deputy Secretary of Defense Memorandum of July 14, 2006.

b. New "evidence" and "information" does not include legal argument or factual assertions not supported through documentation or witness testimony. For example, documents that merely claim the detainee is not an enemy combatant and/or that primarily focus on the legality of his detention or the propriety of his CSRT/ARB process will not be reviewed under these procedures. Information that contends the detainee is not an enemy combatant and that contains photographs, affidavits, videotaped witness statements or other supporting exhibits may be considered new evidence or information, as would documentation of investigative results.

5. Conduct of a "New Evidence Review"

a. Every effort will be made to make a decision regarding whether or not to convene a new CSRT within 90 days of the "new evidence" being received at the above address.

b. If the evidence is found to meet the "new evidence" standard, the DSD will direct that a CSRT convene to reconsider the basis of the detainee's EC status in light of the new information. This CSRT will follow the procedures found in the "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo, Cuba."

c. If the evidence does not meet the "new evidence" standard, a new CSRT will not be convened.

d. The decision to convene a CSRT to reconsider the basis of the detainee's EC status in light of "new evi-

dence" is a matter vested in the unreviewable discretion of the DSD.

/s/ FRANK SWEIGART
FRANK SWEIGART
Director, OARDEC

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1197

HAJI BISMULLAH, ET AL., PETITIONER

v.

ROBERT M. GATES, RESPONDENT

No. 06-1397

HUZAIFA PARHAT, ET AL., PETITIONER

v.

ROBERT M. GATES, RESPONDENT

DECLARATION OF GENERAL MICHAEL V. HAYDEN, USAF, DIRECTOR, CENTRAL INTELLIGENCE AGENCY

I, MICHAEL V. HAYDEN, hereby declare and state:

1. I am the Director of the Central Intelligence Agency (CIA) and have served in this capacity since 30 April 2006. In my capacity as Director, I lead the CIA and manage the Intelligence Community's human intelligence and open source collection programs on behalf of the Director of National Intelligence (DNI). I have held a number of positions in the Intelligence Community,

including Principal Deputy Director of National Intelligence, from April 2005 to April 2006; Director, National Security Agency/Chief, Central Security Service (NSA/CSS), Fort George G. Meade, Maryland, from March 1999 to April 2005; Commander of the Air Intelligence Agency and Director of the Joint Command and Control Warfare Center, both headquartered at Kelly Air Force Base, Texas, from January 1996 to September 1997; and Director, Intelligence Directorate, U.S. European Command, Stuttgart, Germany, from May 1993 to October 1995.

2. I am a four-star general in the United States Air Force and have held senior staff positions at the Pentagon, the National Security Council, and the U.S. Embassy in Sofia, Bulgaria, as well as serving as Deputy Chief of Staff for United Nations Command and U.S. Forces Korea. I entered active duty in 1969 as a distinguished graduate of the Reserve Officer Training Corps program.

3. I make the following statements based upon my personal knowledge and information provided to me in my official capacity.

4. This unclassified declaration is submitted in support of the Government's petition for rehearing. It describes for the Court the damage to the national security that reasonably can be expected to result from compliance with the Court's 20 July 2007 decision.

I. Purpose Of This Declaration

A. The Bismullah Decision

5. Through the exercise of my official duties, I have been advised of this litigation. I am familiar with the

Court's 20 July 2007 decision in this matter. Among other things, I understand that the Court held that the "record on review" under the Detainee Treatment Act (DTA) is not limited to the Record of Proceedings that was presented to, and considered by, the Combatant Status Review Tribunal (CSRT) in making its enemy combatant determinations. Rather, I understand that the Court held that the "record on review" is comprised of all information the CSRT is "authorized to obtain and consider" under DoD regulations, which is defined as "such reasonably available information in the possession of the U.S. Government bearing on the issue whether the detainee meets the criteria to be designated as an enemy combatant."

6. I also understand that the Court's definition of "government information" is binding on all appeals of CSRT determinations brought pursuant to the Detainee Treatment Act (DTA), not simply this case. I am informed that if most detainees appeal their CSRT determination, a fair reading of the Court's decision will require review and potential discovery to the Court and detainee counsel of a vast number of the CIA's most sensitive classified documents on counterterrorism intelligence and operations. Included in this total are tens of thousands of highly classified documents.[1]

7. I also am familiar with the U.S. Government's petition for rehearing en banc that is being filed with this declaration. I understand that the Government's

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[1] I understand that the CIA has made classified information available to detainee counsel in previous habeas corpus cases in the district courts. The amount of information that will be made at issue by the *Bismullah* decision, however, is far more voluminous and far more sensitive than that information that has been made available before.

petition argues that the "record on review" is properly limited to the evidence that was actually presented to, and considered by, the CSRT in making its enemy combatant determination, as opposed to the voluminous group of documents that the CSRT was "authorized to obtain and consider" under DoD procedures.

8. This unclassified declaration is submitted in support of the Government's petition for rehearing en banc. This declaration explains, to the greatest extent possible on the public record, the extremely grave damage to the national security that reasonably could be expected if the "Government Information" is provided to the Court and detainee counsel.

9. The details explaining the full scope of the damage to the national security are classified. Therefore, they are described in my classified declaration, which will be submitted to the Court *in camera* and *ex parte*. Because of its sensitivity, the classified declaration will be delivered to a DOJ Security Officer who will assist in its delivery.

B. CIA Information at Issue

10. The breadth of discovery apparently required by the Court's decision will include information about virtually every weapon in the CIA's arsenal to combat the terrorist threat to the United States. The documents will disclose clandestine intelligence activities, including counterterrorism covert action programs, information provided by sensitive sources, and collection activities.

11. First, the majority of the documents that appear to be discoverable under the Court's definition of "government information" relate to the covert action of the

CIA. These documents disclose the classified details of the CIA's covert action programs and also would reveal the CIA's sensitive sources and methods.

12. Second, much of the information that is potentially discoverable was provided to the CIA by foreign intelligence services or discloses the specific assistance provided by the CIA's foreign partners in the global was on terror. If the CIA is compelled to comply with the Court's decision, the CIA will be obligated to inform its foreign liaison partners that a court order requires that the CIA provide this information to the Court and detainee counsel. There is a high probability that certain liaison services will decrease their cooperation with the CIA because of the extent that their information has become enmeshed in U.S. legal proceedings.

13. Third, some information discoverable under the Court's decision originated with, or pertains to, clandestine human intelligence sources. These individuals provide information or assistance to the CIA only upon the condition of absolute and lasting secrecy. Revealing this information—even to the Court or to cleared counsel—would expressly violate these agreements, and would irreparably harm the CIA's ability to utilize current sources and to recruit sources in the future.

14. Finally, the documents include a large amount of information about the CIA's technical intelligence collection abilities and activities. Disclosure of the nature and extent of these activities would significantly diminish the CIA's ability to gather foreign intelligence.

C. *Damage to the National Security*

15. I recognize that the Court has not ordered that any classified information be publicly disclosed. Nevertheless, exceptionally grave damage to the national security reasonably can be expected to result from the Court's decision for three reasons.

16. First, certain information, such as that provided by clandestine sources, is of a nature that even disclosure only to the Court and detainee counsel is reasonably likely to result in damage to the national security. This is so because information provided by sources cannot be disclosed to the Court and detainee counsel with violating the CIA's assurances of confidentiality. If this information were disclosed outside intelligence channels, including to the Court or to detainee counsel, some sources would need to be informed and, as a result, they would restrict or altogether cease cooperation with the CIA. This outcome would severely restrict the U.S. Government's ability to collect intelligence and wage the war on terrorism.

17. Second, I am advised that over 100 appeals have been filed under the provisions of the DTA. I also understand that detainees typically are represented by several attorneys. With over 300 detainees at Guantanamo Bay, Cuba, it appears that compliance with the Court's decision will require disclosure to several hundred—perhaps more than one thousand—attorneys who are not employees of the United States government, who are not trained in handling classified information, and whose interest in protecting national security conflicts with their obligations to their clients. With so many untrained individuals allowed access to such sensitive

information, I believe that unauthorized disclosures, whether intentional or inadvertent, are not only possible but inevitable. Suffice it to say here that the regulations controlling access to classified information recognize that limiting the number of people with access is a necessary step in safeguarding sensitive information. The Court's decision would eviscerate the U.S. Government's carefully conceived plan to keep its mostly highly sensitive information compartmentalized and would increase the likelihood of public disclosure.

18. Finally, because of the kind of information at issue in these cases, Department of Defense teams will have to review every potentially discoverable document to determine if it contains information relevant to a detainee's status as an enemy combatant, and then CIA subject matter experts must conduct a line-by-line review to determine whether or not the document can be provided to detainee counsel or if it must be provided only to the Court. The burden of searching for, collecting, and reviewing such a number of documents will divert CIA counterterrorism personnel from their primary goal of protecting the country from terrorist attack.

II. Conclusion

19. I have described, to the greatest extent possible on the public record, the bases for my judgment that the Court's decision reasonably can be expected to cause exceptionally grave damage to the national security. For a complete description of my determination of my determination, I respectfully refer the Court to my classified declaration, which will be submitted *in camera* and *ex parte*, filed with the Government's petition.

* * * * *

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 6th day of September, 2007.

/s/ MICHAEL V. HAYDEN
MICHAEL V. HAYDEN, USAF
GENERAL MICHAEL V. HAYDEN,
DIRECTOR CENTRAL INTELLIGENCE AGENCY

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 06-1197, 06-1397

HAJI BISMULLAH, ET AL., PETITIONERS

v.

ROBERT M. GATES, RESPONDENT

HUZAIFA PARHAT, ET AL., PETITIONERS

v.

ROBERT M. GATES, RESPONDENT

DECLARATION OF ROBERT S. MUELLER, III DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

I, Robert S. Mueller, III, hereby declare the following:

1. (U) I am the Director of, the Federal Bureau of Investigation (FBI), United States Department of Justice, a component of the Executive Department or the United States Government. I am responsible for, among other things, the national security operations of the FBI, including the FBI's Counterterrorism Division.

Derived From: MULTIPLE SOURCES
Declassify on: 20320907

2. (U) The matters stated herein are based upon my personal knowledge, my review and consideration of documents and information available to me in my official capacity, information furnished by Special Agents and other employees of the FBI, and my conclusions have been reached in accordance therewith.

3. (U) I am generally familiar with the Court's July 20, 2007 decision and order in this matter. I submit this declaration in support of the government's Petition for Rehearing and suggestion for Rehearing *En Banc*.

4. (U) For the Court's convenience, I have divided this declaration into three parts. Part I describes the serious burdens the Court's decision will, if not appropriately modified, place upon the counterterrorism resources and operations of the FBI. Part II describes types of highly sensitive classified FBI information and techniques at issue. Part III discuses the protective order. These sections will demonstrate that FBI compliance with the Court's order could reasonably be expected to cause serious damage to the national security and, therefore, should be reconsidered.

Part I. (U) The Burden on the FBI's Counterterrorism Resources and Operations

5. (U) For several reasons, the requirement that the FBI disclose, even to properly cleared detainee counsel, all of the information in its possession

that the Combatant Status Review Tribunals (CSRT) were authorized to obtain and consider would cause serious damage to the national security.

6. (U) In order to comply with the Order, the FBI would have to search for and disclose potentially hundreds of thousands of documents. The FBI has two ways to search for responsive documents: one way provides access to all documents that have been uploaded into the FBI's Automated Case Support (ACS), the electronic system which has the most complete repository of FBI materials, but is extraordinarily time consuming and would likely have a negative impact on the use of ACS during the search periods; and the second way provides access only to a subset of documents that have been uploaded into ACS but could be done in a reasonable period of time without crippling the system.

7. (U) ACS is an old mainframe computer system and searches of its data must be "literal." For example, in order to search for documents relating to a particular detainee, separate searches must be run for each spelling variant of each name (first, middle, last and alias). Additional searches must be run for every combination of names (e.g., first-last, first-middle-last, alias-last, last-first, etc.). Each of these searches is run against the approximately 27 million documents in the electronic files.

8. (S)

9. (U) Searches like ones conducted to find the Paracha documents encumber ACS because all of the

electronic files of the FBI are being searched for the various terms. These searches must take place after normal business hours and on weekends so as not to impair the FBI's electronic record search capacity thereby adversely affect the ability of other FBI employees to use ACS in support of the FBI's primary missions.[1]

10. (U) In order to meet Court-imposed deadlines, ACS searches would have to be run around the clock from multiple. computers. Even with such extraordinary measures, the FBI would still not be able to meet the Court's deadlines. ACS is an operational system used to support everything from white-collar and violent crime to counterespionage and counterterrorism investigations. Performing multiple simultaneous searches of the nature that would be required to support this order may have a negative impact on the overall performance of ACS.

11. (U) As an alternative to searching ACS, the FBI could conduct these searches through its Investigative Data Warehouse (IDW) system. IDW is a "warehouse of information that provides a single-access repository for information utilizing extensive data sources, including those located in FBI files and information from sources outside of the FBI. IDW is populated with approximately two-thirds of the information that is contained in ACS. As is pertinent to these cases, IDW does not contain information from ACS that has restricted access, such as tax records and grand

[1] (U) ACS is used for investigative and analytical searches, uploading or downloading documents, and setting investigative leads.

jury materials. Because counterterrorism records are generally not restricted, however, IDW searches are likely to reveal most, if not all of the documents that would be revealed through ACS searches. If IDW were an acceptable route through which to conduct these searches, the FBI could conduct ACS searches only when there is some reason to believe that information pertaining to a particular detainee is in restricted files.

12. (U) Unlike ACS, IDW can be efficiently used to conduct batch (or bulk) data searches. Those searches can be conducted in a more condensed time frame and will have no affect on ACS, because the searches are not run against the ACS mainframe computer system. There would also be no adverse effects on searches and other tasks being performed on ACS or IDW at the same time.

13. (U) Provided that the Court and detainees' counsel do not object to the FBI satisfying its discovery obligation to produce all information that is "reasonably available" through IDW searches, the FBI would likely be able to conduct the initial document identification searches in a reasonable period of time. This, however, would not alleviate the other issues discussed below.

14. (U) Once potentially responsive documents are identified through either ACS or IDW searches, the FBI must provide the documents to the DoD. The DoD will then conduct its own search and review to determine which documents are actually pertinent documents to the FBI for a "need to know" review.

15. (U) Based upon initial search results, it is probable that tens of thousands of documents may need to undergo this "need to know" review by the FBI. Agents and analysts would be required to review the documents carefully in order to identify any highly sensitive information and techniques described in Part II of this declaration.

16. (U) While it is not possible at this time to estimate the number of agents and analysts who would be required to perform such a review, it is likely to be significant. Due to the specialized subject matter of the documents, it is expected that the review would be performed by agents and analysts assigned to the Counterterrorism Division (CTD) of the FBI.

17. (S)

Part II. (U) Revelation of Highly Sensitive Counterterrorism Information and Techniques

18. (S)

19. (U) Information subject to dissemination pursuant to the Court's order will come from numerous sources, including FBI counterterrorism investigative files of subjects other than the detainees, human sources, foreign government services, other government agencies and other sensitive techniques, including Foreign Intelligence Surveillance Act (FISA) authorized searches and surveillance. Revealing intelligence acquired from or by these other sources will likely also reveal current subjects of national security investigations.

20. (U) Disseminating human source information could reasonably lead to the disclosure of their identities because often the information provided by human sources is singular in nature. The disclosure of singular information could endanger the life of the source or his/her family or friends, or cause the source to suffer physical or economic harm or ostracism within the community. These consequences, and the inability of the FBI to protect the identities of its human sources, would make it exceptionally more difficult for the FBI and other U.S. intelligence agencies to recruit human sources in the future.

21. (S//OC/NF)

22. (U) The FBI receives information from foreign intelligence and law enforcement services in furtherance or its counterterrorism mission. That information is often provided with strict limitations on its use. Generally, the FBI must obtain permission from the foreign service before it can further disseminate or use its information in the course of other proceedings. Further dissemination by the FBI, even to cleared defense counsel or the Court, would require this extensive, time-consuming coordination with every nation that has provided information related to a detainee.

23. (U) Finally, FBI files contain documents provided by other U.S. intelligence agencies. The FBI is not in a position to evaluate the sensitivity of the other government agency information. In fact, standard procedures for handling classified information require that the information must be referred back to the originating agency for re-

view to determine whether it can be disseminated. Those reviews will have to be done by other government agencies whose personnel will also be engaged in their own review of substantive information as required by this order.

24. (S)

25. (S//NF)

Part III. The Protective Order

26. (U) The protective order entered by the Court acknowledges the sensitivity of the classified national security information at issue but does not provide sufficient safeguards to ensure that there is no disclosure, inadvertent *or* otherwise, of classified national security information. Detainees' counsel, although appropriately cleared, do not handle classified information with regularity. In addition, they do not have much training on the proper handling, storage and maintenance of such information.

27. (U) The protective order does not address several key measures that would reduce the risk of disclosures of classified information. For example, there is no provision for where or how the classified information is to be stored. There is also no provision for where detainees' counsel is to review the classified information. There is no prohibition on detainees' counsel taking the classified information, including any notes made from the classified information, to unsecured locations, such as back to their offices or to their homes.

28. (U) In addition, there is no provision for a Court Security Officer (CSO) to be appointed in these

matters. The CSO would be an added measure of protection for the classified information. The CSO could better ensure proper storage, review and retention of classified information, and the CSO could advise detainee counsel about proper use and handling of the information. With a CSO's involvement, detainee counsel would be less likely to inadvertently disclose classified information.

29. (U) Were the Court to modify the protective order in those ways, it would alleviate some of the FBI's concerns about disclosure, although the other impacts to operations and national security, noted in Parts I and II above, remain.

Part IV. Conclusion

30. (S)

Pursuant to 2.8 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 6, 2007.

/s/ ROBERT S. MUELLER, III
ROBERT S. MUELLER, III
DIRECTOR FEDERAL BUREAU OF INVESTIGATION

APPENDIX J

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 06-1197

HAJI BISMULLAH, PETITIONERS

v.

ROBERT M. GATES, SECRETARY OF DEFENSE, DEFENDANTS

UNCLASSIFIED DECLARATION OF LTG KEITH B. ALEXANDER, DIRECTOR, NATIONAL SECURITY AGENCY

DECLARATION OF LIEUTENANT GENERAL KEITH B. ALEXANDER, DIRECTOR, NATIONAL SECURITY AGENCY

(U) I, Lieutenant General Keith B. Alexander, do hereby state and declare as follows:

(U) Introduction and Summary

1. (U) I am the Director of the National Security Agency (NSA), an intelligence agency within the Department of Defense. I am responsible for directing the NSA, overseeing the operations undertaken to carry out its mission and, by specific charge of the President and the Director of National Intelligence, protecting NSA activities and intelligence sources and methods. I make this declaration in support of the United States' request

for rehearing en banc and to inform the court of the sensitivity of the information potentially at issue in cases involving detainees held at Guantanamo Bay, Cuba. The statements made herein are based on my personal knowledge of NSA activities and operations, and on information available to me as Director of the NSA.

2. (U) Through the exercise of my official duties, I have been advised of this litigation and the court's decision of 20 July 2007. Specifically, I have been advised that the Court's decision requires this agency to compile and provide to the Court and potentially to counsel for the detainees all information that the Combatant Status Review Tribunal (hereafter Tribunal) was authorized to obtain and consider. In addition, I have been advised that the decision requires production of the information even if the information did not form the basis of the detention of the individual and even if the information was never considered by the Tribunal. It is my understanding that, currently, approximately 130 detainees have filed petitions for rehearing.

(U) Background

A. ***(U) The National Security Agency***

3. (U) The NSA was established by Presidential Directive in 1952 as a separately organized agency within the Department of Defense. Under Executive Older 12333, § I.12(b), as amended, NSA's cryptologic mission includes three functions: (1) to collect, process, and disseminate signals intelligence (SIGINT) information, of which COMINT is a significant subset, for (a) national foreign intelligence purposes, (b) counterintelligence purposes, and (c) the support of military operations; (2) to conduct information security activities; and (3) to con-

duct operations security training for the U.S. Government.

B. *(U) Global War on Terror*

4. (U) On September 11, 2001, the al Qa'ida terrorist network launched a set of coordinated attacks along the East Coast of the United States. Four commercial jetliners, each carefully selected to be fully loaded with fuel for a transcontinental flight, were hijacked by al Qa'ida operatives. Those operatives targeted the Nation's financial center in New York with two of the jetliners, which they deliberately flew into the Twin Towers of the World Trade Center. Al Qa'ida targeted the headquarters of the Nation's Armed Forces, the Pentagon, with the third jetliner. Al Qa'ida operatives were apparently headed toward Washington, D.C. with the fourth jetliner when passengers struggled with the hijackers and the plane crashed in Shanksville, Pennsylvania. The intended target of this fourth jetliner was most evidently the White House or the Capitol, strongly suggesting that al Qa'ida's intended mission was to strike a decapitation blew to the Government of the United States—to kill the President, the Vice President, or Members of Congress. The attacks of September 11 resulted in approximately 3,00C deaths—the highest single-day death toll from hostile foreign attacks in the Nation's history. In addition, these attacks shut down air travel in the United States, disrupted the Nation's financial markets and government operations, and caused billions of dollars of damage to the economy.

5. (U) On September 14, 2001, the President declared a national emergency "by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immedi-

ate threat of further attacks on the United States." Proclamation No. 7463, 66 Fed. Reg. 48199 (Sept. 14,2001). The United States also launched a massive military response, both at home and abroad. The United States also immediately began plans for a military response directed at al Qa'ida's training grounds and haven in Afghanistan. On September 14, 2001, both Houses of Congress passed a Joint Resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11. Authorization for Use of Military Force, Pub. L. No. 107-40 § 21(a), 115 Stat. 224, 224 (Sept. 18, 2001) ("Cong. Auth."). Congress also expressly acknowledged that the attacks rendered it "necessary and appropriate" for the United States to exercise its right "to protect United States citizens both at home and abroad," and acknowledged in particular that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." *Id.* pmbl. As a direct result of the military actions described above, and during the active conflict, numerous individuals were captured and detained by the United States.

6. (U) As the President made clear at the time, the attacks of September 11 "created a state of armed conflict." Military Order, § 1(a), 66 Fed. Reg. 57833, 57833 (Nov. 13,2001). Indeed, shortly after the attacks, NATO took the unprecedented step of invoking Article 5 of the North Atlantic Treaty, which provides that an "armed attack against one or more of [the parties] shall be considered an attack against them all." North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243,246; see also Statement by NATO Secre-

tary General Lord Robertson (Oct. 2, 2001), available at http://www.nato.int/docu/speech/2001/s011002a.htm ("[I]t has now been determined that the attack against the United States on September 11th was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty. . . . "). The President also determined that al Qa'ida terrorists "possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government," and he concluded that "an extraordinary emergency exists for national defense purposes." Military Order, § l(c), (g), 66 Fed. Reg. at 57833-34. As the Supreme Court has recognized, implicit in the Authorization to Use Military Force was authorization to detain individuals captured during the armed conflict.

C. ***(U) Intelligence Challenges After September 11, 2001***

7. (U) As a result of the unprecedented attacks of September 11, 2001, the United States found itself immediately propelled into a worldwide war against a network of terrorist groups, centered on and affiliated with al Qa'ida, that possesses the evolving capability and intention of inflicting further catastrophic attacks on the United States. That war is continuing today, at home as well as abroad.

8. (U) The war against al Qa'ida and its allies is a very different kind of war, against a very different enemy, than any other war or enemy the Nation has previously faced. Al Qa'ida and its supporters operate not as a traditional nation-state but as a diffuse, decentralized

global network of individuals, cells, and loosely associated, often disparate groups, that act sometimes in concert, sometimes independently, and sometimes in the United States, but always in secret—and their mission is to destroy lives and to disrupt a way of life through terrorist acts. Al Qa'ida works in the shadows; secrecy is essential to al Qa'ida's success in plotting and executing its terrorist attacks.

(U) NSA Statutory Privilege

9. (U) Information regarding NSA's intelligence efforts directly relates to the Agency's most core functions and activities. Congress has recognized the harms that may result from disclosure of this information and the need to protect the fragile nature of NSA's cryptologic efforts, including, but not limited to, the existence and depth of signal intelligence related analytical successes, weaknesses and exploitation techniques. As a result, Congress has passed several statutes specifically protecting this type of information from disclosure. For example, the NSA activities described in this declaration are subject to protection pursuant to Section 6 of the National Security Agency Act of 1959, Public Law No. 86-36 (codified as a note to 50 U.S.C. § 402) ("NSA Act").

10. (U) Section 6 of the NSA Act provides that "[n]othing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency [or] any information with respect to the activities thereof . . . ". By this language Congress expressed its determination that disclosure of any information relating to NSA activities is potentially harmful. Section 6 states unequivocally that, notwithstanding any other law, NSA cannot be compelled to disclose any information with respect to its

activities. Further, while in this case the harm would be very serious, NSA is not required to demonstrate specific harm to national security when invoking this statutory privilege, but only to show that the information relates to its activities. Rather, for this statutory privilege to apply, NSA must demonstrate only that the information to be protected falls within the scope of Section 6. NSA's functions and activities are therefore protected from disclosure regardless of whether or not the information is classified. As Congress appreciated, that which is potentially innocuous to some is potentially exceptionally useful to our adversaries who are targets of NSA collection. This is the risk in the instant litigation where the contemplated review by the Court or Counsel places at risk of inadvertent disclosure the very heart of NSA's operations, its successful collection against these detainees.

(U) Summary and Conclusion

11 (U) The breadth of information and dissemination to counsel for all of the detainees that is contemplated by the Court's decision in this case, would create a very real danger of disclosure (intentional or inadvertent) of sensitive intelligence information to include sources and methods of collection. Although this information would be produced pursuant to a Court Order, the widespread dissemination of this information even to cleared counsel introduces a real risk of inadvertent (or other) disclosure.

12. (U) The United States has an overwhelming interest in detecting and thwarting further mass casualty attacks by al Qa'ida. The United States has already suffered one attack that killed thousands, disrupted the Nation's financial center for days, and successfully struck

at the command and control center for the nation's military. Al Qa'ida continues to possess the ability and intent to carry out a massive attack in the United States that could result in a significant loss of life, as well as have a devastating impact on the U.S. economy. The exposure of sensitive intelligence information, including particularly the sources and methods of collection of this information, could cause exceptionally grave damage to the national security of the United States.

I declare under penalty of perjury that the foregoing is true and correct.

DATE: [*7 Sept. 2007*]

/s/ KEITH B. ALEXANDER
LT. GEN. KEITH B. ALEXANDER
Director, National Security Agency

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 06-1197
UNCLASSIFIED

HAJI BISMULLAH, ET AL., PLAINTIFFS

v.

ROBERT GATES, ET AL., DEFENDANTS

DECLARATION OF J. MICHAEL McCONNELL, DIRECTOR OF NATIONAL INTELLIGENCE

I, J. Michael McConnell, declare as follows:

1. I am the Director of National Intelligence (DNI) of the United States. I have held this position since February 2007. Previously, I have served as Executive Assistant to the Director of Naval Intelligence, as Chief of Naval Forces Division at the National Security Agency, as Director of Intelligence for the Joint Chiefs of Staff during Operation Desert Storm, and as Director of the National Security Agency.

Background on the Director of National Intelligence

2. Congress created the position of the Director of National Intelligence (DNI) in the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §§ 1011(a) and 1097, 118 Stat. 3638, 3643-63, 3698-

99 (2004) (amending sections 102 through 104 of Title I of the National Security Act of 1947). Subject to the authority, direction, and control of the President, the DNI serves as head of the United States Intelligence Community and as the principal advisor to the President, the National Security Council, and the Homeland Security Council for intelligence matters related to national security. 50 U.S.C. § 403(b)(1), (2).

3. The United States Intelligence Community includes the Office of the Director of National Intelligence; the Central Intelligence Agency; the National Security Agency; the Defense Intelligence Agency; the National Geospatial-Intelligence Agency; the National Reconnaissance Office; other offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs; the intelligence elements of the military services, the Federal Bureau of Investigation, the Department of Treasury, the Department of Energy, the Drug Enforcement Administration, and the Coast Guard; the Bureau of Intelligence and Research of the Department of State; the elements of the Department of Homeland Security concerned with the analysis of intelligence information; and such other elements of any other department or agency as may be designated by the President, or jointly designated by the DNI and the head of the department or agency concerned, as an element of the Intelligence Community. 50 U.S.C. § 401a(4).

4. The responsibilities and authorities of the DNI are set forth in the National Security Act of 1947, as amended. These responsibilities include ensuring that national intelligence is provided to the President, heads of the departments and agencies of the Executive

Branch, the Chairman of the Joint Chiefs of Staff and senior military commanders, and the Senate and House of Representatives and committees thereof. 50 U.S.C. § 403-1(a)(1). The DNI is charged with establishing the objectives of; determining the requirements and priorities for; and managing and directing the tasking, collection, analysis, production, and dissemination of national intelligence by elements of the Intelligence Community. 50 U.S.C. § 403-1(f)(1)(A)(i) and (ii).

5. In addition, the National Security Act of 1947, as amended, states that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-1(i)(1). Consistent with this responsibility, the DNI establishes and implements guidelines for the Intelligence Community for the classification of information under applicable law, Executive Order, or other Presidential directives and for access to and dissemination of intelligence. 50 U.S.C. § 403-1(i)(2)(A), (B).

6. By virtue of my position as DNI, and unless otherwise directed by the President, I have access to all intelligence related to the national security that is collected by any department, agency, or other entity of the United States. Pursuant to Executive Order No. 12958, 3 C.F.R. § 333 (April 7, 1995), as amended by Executive Order No. 13292 (March 25, 2003), reprinted as amended in 50 U.S.C.A. § 435 at 93 (Supp. 2004), the President has authorized me to exercise original TOP SECRET classification authority.

7. The statements made in this declaration are based on my personal knowledge, as well as on information provided to me in my official capacity as DNI.

The *Bismullah* Decision

8. I have been advised of the facts surrounding this case and am aware of the Court's July 20, 2007 ruling. I understand that the Court held that the record on review under the Detainee Treatment Act (DTA) is not limited to the information that was actually presented to and considered by the Combatant Status Review Tribunal (CSRT) in making its enemy combatant determination. Instead, the Court held that the record on review is comprised of all information the CSRT was authorized to obtain and consider under DOD regulations, which is defined as "such reasonably available information in the possession of the U.S. Government bearing on the issue whether the detainee meets the criteria to be designated as an enemy combatant." I also understand that the Court's definition of the record on review is binding on all appeals of CSRT determinations brought pursuant to the DTA.

9. I have also reviewed and personally considered the information contained in the classified *in camera, ex parte* declarations of General Michael H. Hayden, Director, Central Intelligence Agency, and Lieutenant General Keith B. Alexander, Director, National Security Agency, that are filed in this matter. Those declarations provide detailed discussions of the information that would have to be disclosed as a result of the Court's decision and the harms that would result from such disclosures.

10. This declaration is submitted in support of the Government's petition for rehearing in this case. Its purpose is to describe and explain the harm to national security that reasonably can be expected to result if the

information described in the CIA and NSA declarations must be provided to the Court and detainee counsel. I also submit this declaration pursuant to my statutory responsibility to protect intelligence sources and methods and to protect the national security and foreign relations of the United States.

Potential Harm from Disclosure of Classified Information

11. This Court's ruling will result in the Intelligence Community having to provide the Court and detainees counsel with thousands of pages of material, including some of the Government's most sensitive and highly classified records. To do so could significantly damage our ability to protect sources and methods and could cause grave harm to our national security.

12. Although the Court has not required that any classified information be publicly disclosed, but rather that information be provided to cleared counsel and the Court, I nevertheless believe that exceptionally grave damage to national security reasonably can be expected to stem from the Court's decision. It is my understanding that over 100 appeals have been filed under the provisions of the DTA, and with over 300 detainees at Guantanamo Bay disclosure of such classified information to detainee counsel may mean disclosure to hundreds of people who are not employees of the United States government and who are not trained in handling classified information. With so many people allowed access to such sensitive information, I believe that unauthorized disclosures, even if inadvertent, are inevitable.

13. Much of the information at issue here is closely held even within the Intelligence Community, so to pro-

vide this information to potentially hundreds of lawyers for detainees, even if they have clearances, could cause serious damage. Some of this information is so strictly controlled that only a small number of federal government employees have access to it. Such strictly controlled access to classified information is a necessary step in safeguarding this information. The details of the government's access control program are described more fully in the classified declarations filed with the Court. This system for controlling access to the U.S. Government's most highly sensitive information and keeping it compartmentalized has been very carefully conceived. Going outside of this access control program risks public disclosure of our nation's most sensitive secrets.

14. In an effort to counter the Al-Qaeda threat and thwart further attacks on the United States, the intelligence community has used many vital intelligence tools to collect counterterrorism information. While some of these programs are now publicly known, to disclose additional information regarding them or provide greater detail about them in this context would risk public disclosure of classified intelligence information, sources, and methods, thereby enabling adversaries of the United States to avoid detection by the U.S. Intelligence Community and/or take measures to defeat or neutralize U.S. intelligence collection, posing a serious threat of damage to our national security interests. Further elaboration of this concern is provided in the classified declarations being filed with the Court.

15. In addition, the Intelligence Community has many sources of information that must be protected. For example, much of the information at issue was pro-

vided by foreign intelligence services or would reveal the specific assistance provided by foreign partners in the global war on terror. Certain liaison services will likely decrease their cooperation with the U.S. Government if their information is caught up in U.S. court proceedings.

16. Human sources also provide the Intelligence Community with critical information, but only upon the condition of absolute secrecy. Revealing this information would violate the assurances of confidentiality we provide these sources and would likely result in their minimizing or ceasing altogether their cooperation. Such a disclosure would harm the Intelligence Community's ability to retain current sources and recruit new ones, and if we cannot recruit and retain sources, the Intelligence Community simply cannot conduct its business.

Conclusion

17. For all of these reasons and the reasons discussed in the other agency declarations filed with the Court, I believe that the Court's decision in this case could reasonably be expected to cause serious damage, and in some instances, grave damage to our nation's security. In order to protect intelligence sources and methods from unauthorized disclosure and to protect our national security, I submit this declaration in support of the U.S. government's petition for rehearing in this case.

I declare under penalty of perjury that the foregoing is true and correct.

DATE: 6 Sep 07 /s/ J. MICHAEL MCCONNELL
J. MICHAEL MCCONNELL
Director of National Intelligence

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1197

HAJI BISMULLAH, ET AL., PETITIONERS

v.

ROBERT M. GATES, SECRETARY OF DEFENSE,
RESPONDENT

No. 06-1397

HUZAIFA PARHAT, ET AL., PETITIONERS

v.

ROBERT M. GATES, SECRETARY OF DEFENSE,
RESPONDENT

DECLARATION OF THE HONORABLE GORDON R. ENGLAND, DEPUTY SECRETARY OF DEFENSE, DEPARTMENT OF DEFENSE, WASHINGTON, DC

Pursuant to 28 U.S.C. § 1746, I, Gordon R. England, hereby declare that to the best of my knowledge, information, and belief, the following is true, accurate, and correct:

1. I am the Deputy Secretary of Defense. I served as Acting Deputy from May 16, 2005 to January 4, 2006,

when I was recess appointed by the President as Deputy Secretary. I was confirmed by the Senate on April 6, 2006 as the 29th Deputy Secretary of Defense. Prior to that, I served as the Secretary of the Navy, beginning in September 2003.

2. As the Deputy Secretary of Defense, I serve as the Designated Civilian Official responsible for overseeing the detainee review processes at Joint Task Force-Guantanamo (JTF-GTMO). This includes the Combatant Status Review Tribunals (CSRTs) and the Administrative Review Board (ARBs) proceedings.

3. On July 20, 2007, the Court issued its opinion in the above styled cases. Subsequently, a panel of this Court ordered the Government to produce the record, as defined in *Bismullah* on September 13, 2007, in *Paracha* v. *Gates*, No. 06-1038, and other panels have likewise ordered the production of a *Bismullah* record in other cases on other dates. I understand the Court to have determined that the "record on review" under the Detainee Treatment Act is not limited to the record actually presented to and considered by the CSRT in making its enemy combatant determination, but rather includes all information the CSRT is "authorized to obtain and consider" under the Secretary of Defense's CSRT procedures (i.e., the "Government Information," which is defined as "such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant.").

4. As reflected in the Declaration of RADM (ret.) James M. McGarrah, previously submitted in this case, in the 2004-2005 time frame, when the Office for the Administrative Review of the Detention of Enemy Combat-

ants (OARDEC) conducted the CSRTs for 558 Guantanamo detainees, the Recorders (the term Recorder is meant to include the teams that assisted the Recorders), in searching for and gathering material for the CSRTs, relied primarily upon searches of relevant DoD databases, specifically the Joint Detainee Information Management System and the I2G Investigative Information Database (formerly called I2MS). Recorders also went beyond these databases and pursued gathering information from other sources. The "Government Information" with respect to a detainee, however, was not amassed into a single, reproducible file. Nor are there reliable records of the precise materials that were in fact examined by a Recorder in every case. Thus, it is not possible to recreate easily or with any precision the information that was reviewed by the Recorders in performing their duties.

5. Accordingly, in order to attempt to comply with the *Bismullah* ruling and assemble the "Government Information" for any particular detainee, DoD is having to undertake new searches and assembly of materials from which "Government Information" can be taken. The Director of OARDEC has directed six DoD intelligence agencies, the Office of Military Commissions, and five Combatant Commands to identify, assemble and provide information from which the "Government Information" for certain individuals detained at U.S. Naval Base Guantanamo Bay, Cuba can be derived. OARDEC has conducted the same search of its own files for original documents falling within this definition. The particular components tasked for such searches were selected after an assessment was made that their organization may hold potentially responsible documents on the detainees at issue. Searches were initially undertaken with res-

pect to six detainees currently held as enemy combatants at U.S. Naval Station, Guantanamo Bay, Cuba who have filed petitions under the Detainee Treatment Act so that the Department could assess the likely impact of a tasking to gather all available "Government Information" with respect to the Detainee Treatment Act review cases on the mission of each command, agency and office during a time of war.

6. In addition, a number of outside agencies, including the CIA, FBI, State Department, and Department of Homeland Security, as well as the National Security Agency (NSA) within DoD, were separately tasked in the context of this litigation with searching for and assembling information from which "Government Information" can be derived. DoD shares the concerns expressed in some of those outside agencies' declarations regarding the disclosure of highly sensitive information.

7. The current search undertaken to comply with the requirements of the *Bismullah* decision has created an immense burden on the Department of Defense. Documented accounts from the DoD components and commands demonstrate undue burden to war-time missions and objectives, compromise of resources necessary for the war effort, and diversion of significant manpower from the war time mission.

8. For example, one of the components tasked to search for potentially responsive materials is the Criminal Investigation Task Force (CITF). CITF's primary mission is to investigate non-U.S. citizen detainees captured during the Global War on Terrorism and suspected of illegal activities in conjunction with their affiliation to al Qaida and other enemies of the United States. The objective is to either refer the cases to the DoD Of-

fice of Military Commissions for criminal prosecution or to identify detainees who should be released and/or transferred from DoD control. Information obtained as the result of these investigations is also provided to the U.S. intelligence community.

9. To comply with the search-related tasking on the initial set of six cases, CITF created special working groups that included subject matter experts, law enforcement agents and intelligence analysts. The working group developed search terms, protocols and parameters. To date, CITF agents and analysts have spent nearly 2000 total manhours to comply with this tasking. At bottom, CITF reports that it was rendered ineffective for normal operations with respect to about thirty percent of CITF staff, personnel, and resources during the search process. The effect was highly disruptive. Long term repetition of these efforts, that is, extrapolating such efforts to all Detainee Treatment Act review cases (currently involving approximately 230 detainees), would render CITF ineffective as an investigative task force.

10. Other DoD components tasked to conduct searches (aside from NSA, which is addressing this matter in its own declaration in this litigation) also have reported not an insignificant resource toll in the matter. Currently, it is estimated that gathering of such materials has expended several hundred manhours, although efforts are still underway to determine whether additional search-related work from the components is necessary. Long term repetition of such efforts with respect to these components points to a significant burden of these components' abilities to carry out duties associated with their primary mission. For example, the Joint Task

Force-Guantanamo reported that future impact of a wide-scale document gathering effort could impact its primary mission of conducting detention and interrogation operations in support of the Global War on Terrorism by, among other things, diverting personnel otherwise involved in interrogations and analysis from those duties to the gathering of information to support litigation requirements.

11. The above-related examples do not include the work performed by OARDEC, which is discussed in detail below.

12. OARDEC is an organization within the DoD that is responsible for several processes involving detainees at Guantanamo Bay, Cuba. Specifically, OARDEC conducts CSRTs and annual ARBs for detainees at Guantanamo Bay, Cuba. The ARB is an annual review to determine the need to continue the detention of an enemy combatant. The ARB recommends whether an individual should be released, transferred or continue to be detained. This process has resulted in approximately 200 detainees being approved for transfer or release from U.S. custody.

13. OARDEC is responsible for working with each of the DoD components tasked to ensure that a complete and comprehensive search for "Government Information" was accomplished. It is then the responsibility of OARDEC to review the information collected by the components to determine what information is "Government Information" that should be produced in compliance with the *Bismullah* decision.

14. OARDEC is working or coordinating with each DoD agency and command, and outside agencies, on the gathering of documents. Many of the agencies and com-

mands have different data systems and information in them is retrieved differently and sent to OARDEC in different formats. Some agencies have required OARDEC to review documents at their facility; others have provided documents to OARDEC. OARDEC is also conducting a review of the CSRT tribunal files for the cases to gather any appropriate original documents for the record on review.

15. Once documents are made available to OARDEC, either by DoD components or by outside agencies, OARDEC must then review the documents to eliminate documents not relevant to the detainee and not relevant to the detainee's enemy combatant status. Where materials are supplied to OARDEC in electronic form, OARDEC is responsible for developing appropriate search terms, protocols, and parameters for searching through the materials via electronic means and conducting such review. In addition, some agencies provide documents in a format that is not electronically searchable, so OARDEC is responsible for re-formatting those documents before they can conduct their search. Not all agencies provide documents in electronic form; in such cases OARDEC is responsible for manually reviewing the documents. Once OARDEC's review is completed and a set of material for potential production to the Court and detainee counsel is gathered from a component or agency, OARDEC then forwards these documents to the originating agency for a "need to know" analysis to determine the propriety of disclosure of the documents to the court or detainee's counsel.

16. The burden to OARDEC has been substantial and continues to constitute a significant burden to the mission and objectives of OARDEC at both its Washing-

ton, DC Headquarter offices and its offices at Guantanamo Bay, Cuba. The combined efforts by OARDEC for all agencies, offices and commands so far have involved more than 270 manhours just with respect to the gathering of information for the Paracha matter. To conduct the work accomplished so far, which is not complete even with respect to the Paracha matter, much less the other cases, OARDEC has had to re-prioritize its work or delay other pressing responsibilities, including preparing for or conducting CSRTs for recently arrived Guantanamo detainees, ARBs, and new CSRTs based on newly obtained evidence (*see* OARDEC Instruction 5421.1 (issued May 7, 2007)). OARDEC has experienced a decrease of production of the ARBs and CSRTs over the last four weeks. This is due to the fact that OARDEC has had to take 18 of the 20 personnel assigned to the production of ARB and CSRT case files and reassign them to the current gathering and review effort. A long-term and significant increase in these gathering efforts, which would be the result of effectuating such efforts for all Detainee Treatment Act review cases (currently involving approximately 130 detainees), would lead to an exponential increase in the burden on OARDEC's ability to carry out its other duties and a requirement for significantly increased staffing to carry out the assembly of Government Information called for under *Bismullah*.

17. Aside from the burdens discussed above, additional burdens are involved in DoD's attempt to comply with the Court's order regarding production of Government Information to the Court and counsel. Prior to the regime created through the Court's order in *Bismullah*, with respect to Guantanamo detainees with habeas cases or DTA review petitions and where so ordered by a court, only the "Government Evidence," that is, the re-

cord considered by the CSRT in making the enemy combatant determination (with certain exceptions), was provided to the Court and properly cleared and otherwise qualified petitioner's counsel. The required disclosure of the "Government Information" per the *Bismullah* decision, however, will typically require a much broader potential production of materials to the Court and petitioner's counsel. As indicated above, this broader set of typically classified materials must be reviewed by appropriate DoD components and outside agencies to determine "need to know," that is, the suitability of disclosure of such information to the Court and counsel. Although a precise assessment of such burdens with respect to DoD components (other than NSA) cannot be made at this time, given that such work on the cases in process is not complete, the process promises to be burdensome and time-consuming.

18. Although DoD is committed to devoting all necessary resources to complying with any other court, it is important to note that our components are still engaged in active combat around the world in the Global War on Terrorism. Compliance with the *Bismullah* court order that requires the gathering of information as has been described here will require DoD to pull resources away from the warfighting and intelligence gathering missions that are essential to fighting the Global War on Terrorism. We cannot overstate the importance of ensuring that our components can focus on their primary missions.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true, accurate, and correct.

Dated this the 7th day of September 2007

/s/ GORDON ENGLAND
The Honorable GORDON R. ENGLAND
Deputy Secretary of Defense
Department of Defense
Pentagon, Washington, DC

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1197

HAJI BISMULLAH, ET AL., PETITIONERS

v.

ROBERT M. GATES, SECRETARY OF DEFENSE,
RESPONDENT

No. 06-1397

HUZAIFA PARHAT, ET AL., PETITIONERS

v.

ROBERT M. GATES, SECRETARY OF DEFENSE,
RESPONDENT

[ARGUMENT HELD ON MAY 5, 2007]

DECLARATION OF REAR ADMIRAL (Retired)
JAMES M. McGARRAH

Pursuant to 28 U.S.C. § 1746, I, James M. McGarrah, hereby declare that to the best of my knowledge, information, and belief, the following is true, accurate, and correct:

1. I was the Director of the Office for the Administrative Review of the Detention of Enemy Combatants

(OARDEC) from July 2004 until March 2006. I currently serve as a Special Assistant to the Deputy Assistant Secretary of Defense for Detainee Affairs. This declaration is intended to provide a general description of the overall Combatant Status Review Tribunal (CSRT) process during this period in which I served as the Director of OARDEC, and concurrently as the CSRT Convening Authority. CSRT Order, 7 July 2004, para. f. This declaration is based on my personal knowledge as well as information obtained in my official capacity as Director of OARDEC and CSRT Convening Authority.

2. In July 2004, the Department of Defense established the CSRT process. The process was established to provide a formalized, standardized process to review the combatant status of all "foreign nationals held as enemy combatants in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba." CSRT Order, 7 July 2004. OARDEC was established in July 2004, and charged with implementing this process, as well as the annual Administrative Review Boards conducted for detainees at Guantanamo. As Director of OARDEC, I was appointed the CSRT Convening Authority by the Secretary of the Navy in July 2004. During my tenure as Director, we conducted 558 Combatant Status Review Tribunals (CSRTs). During that time frame, over 200 personnel (including active duty and reserve military, civilians and contractors) were assigned to OARDEC, and were involved in carrying out OARDEC's missions. The primary OARDEC mission during this period was preparing for and conducting these Tribunals, and involved the vast majority of these assigned personnel. Some of these personnel were as-

signed to work at Guantanamo Bay while others were assigned in the Washington, D.C. area.

3. The CSRT procedures provide that the CSRT "Tribunal is authorized to * * * request the production of such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings (cumulatively called hereinafter the 'Government Information')." CSRT Procedures, Enc. 1, § E(3). The CSRT Recorder is charged with, among other things, "obtain[ing] and examin[ing] the Government Information." CSRT Procedures, Enc. 2, § 2C(1). Additionally, "the Recorder has a duty to present to the CSRT such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant, including the circumstances of how the detainee was taken into the custody of the U.S. or allied forces (the "Government Evidence")." CSRT Procedures, Enc. 2, § B(1).

4. Prior to September 1, 2004, the CSRT Recorder personally collected the Government Information. At that time, due to the other extensive responsibilities of the Recorder[2] and in order to provide greater efficiency in the collection of this information, additional individuals were assigned to assist the Recorder in gathering

[2] Among other duties, the Recorder must attend and present evidence at CSRT hearings and prepare the records of those proceedings. *See* CSRT Procedures, Enc. 2, § C.

detainee information. Responsibilities of Recorder, CSRT Procedures, Enc. 2, § C(2). Accordingly, after September 1, 2004, the task of gathering and analyzing the Government Information was performed by a specially-formed research, collection and coordination team (hereinafter referred to as "Team"). This Team, which was dedicated to the functions of obtaining, examining and analyzing detainee information, brought greater manpower resources to this important function. In addition, due to the location of the Team in the Washington, D.C. area in close proximity to other Government agencies, the interagency approval procedure used for clearance of the Government Evidence was much more efficient. *See supra* text accompanying Paragraph 10. The dedicated Team focused on the tasks of identifying relevant information on each detainee, including information that might suggest that the detainee should not be designated as an enemy combatant.

5. Members assigned to the Team each received approximately two weeks of training prior to assuming their data collection responsibilities, as well as additional instruction, as appropriate, during their tenures. The training included instruction on the CSRT process with specific emphasis on the Recorder's functions and responsibilities, operator training on the pertinent government databases, as well as cultural awareness and intelligence training to assist Team members in better understanding the potential significance of individual data elements. The Team was organized in three separate functions.

a. The first function, Case Writer, had primary responsibility for researching, reviewing and ultimately collecting information from government sources. The

Case Writers would the use this information to draft an unclassified summary of the factual basis for the detainee's designation as an enemy combatant.

b. The second function, Quality Assurance (QA), reviewed the draft products from the Case Writer to ensure they were logical, consistent and grammatically correct.

c. The third function, Coordination, worked with the various government agencies whose information was to be used as Government Evidence, in order to receive clearance to use their information in the Tribunal, as well as to verify the accuracy of the Unclassified Summary.

6. Although the Team functioned as a data collection "staff" for the Recorders, each Recorder was held personally responsible for reviewing and verifying the information provided by the Team, for finalizing each package of unclassified and classified Government Evidence (to include the Unclassified Summary), and for presenting this evidence to the tribunal. In reviewing and verifying the information received from the Team, the Recorder had access to the same information systems used by the Team, and could add information to be presented to the CSRT panel as Government Evidence or as material that might suggest that the detainee should not be designated as an enemy combatant; could decline to use as Government Evidence any material provided by the Team; and/or could submit requests for further information to obtain additional evidence from government entities. New information obtained by the Recorder in this manner would be treated as Government Information and, if appropriate, would be included

in the Government Evidence presented to the CSRT panel. Throughout the CSRT process, the Recorder was responsible for making the final determination of what material would be presented to the CSRT as the Government Evidence. CSRT Procedures, Enc. 2, § B(1). In addition, both the Personal Representative and the Tribunal members had, and exercised, the ability to request additional information; the Recorder had the responsibility to respond to such requests.

7. The Team pursued leads found in government files relating to a detainee to identify other material that would qualify as Government Information. First, the Team conducted computer searches via a Defense Department database called the Joint Detainee Information Management System (JDIMS).

a. JDIMS is an information management tool developed and used primarily to support interrogations. Information stored on this database includes interrogation reports, intelligence messages, intelligence reports, analyst products, and periodic detainee assessments by DoD and other U.S. Government organizations, such as the U.S. Army Criminal Investigation Task Force (CITF). Only information classified at the SECRET level and below is placed into the JDIMS system. The information also must be in the possession and control of the Joint Intelligence Group (JIG), an element of Joint Task Force Guantanamo (JTF-GTMO). The JDIMS system is a repository of centralized information, but does not and could not hold all information that is in the possession of the United States Government regarding a particular detainee.

b. JIG personnel regularly use and rely on this database as a primary resource when conducting research about detainees and their interrelationships, when preparing for interrogations and when responding to official requests for information about detainees, as well as for other mission-critical functions. Accordingly, the JIG regularly populates the database with new detainee information developed or uncovered through research and interrogations, and that is assessed as pertinent to the detainee.

c. Because the JDIMS system represented one of the most complete repositories of information on each detainee, it was used as the starting point for gathering the material that would qualify as the Government Information. Additionally, this database permits the interrelationships between individuals and/or organizations to be searched and cross-referenced electronically. Ultimately, most of the data qualifying as Government Information were found through JDIMS. The Team also followed references that arose in these files—if a file revealed possible locations for more information, the Team pursued those leads.

8. The second database regularly searched by the Team was the database system called I2MS, used primarily by investigators from the Criminal Investigation Task Force (the investigatory arm for the Office of Military Commissions). This system holds information pertaining to individual detainees collected by CITF from both the law enforcement and intelligence communities, and would include files on the detainees developed by the authorities who captured the detainees and transferred them to Guantanamo, files relating to any subsequent reviews of the determination to continue to hold

the detainee, and interrogation files. The Team also followed references that arose in these files—if a file revealed possible locations for more information, the Team pursued those leads.

9. Third, the Team reviewed paper files in the possession of JTF-GTMO, as well as other Department of Defense databases and files and might contain information on the detainee.

10. The Team also had the ability to submit requests for information to other organizations within the Department of Defense and to other federal agencies that might have information bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, that was not already in the JDIMS database. These requests included information above the classification level of SECRET.

a. In both the initial data search and in requests for additional information from other agencies, the Team's requests would be for any information bearing on the issue of whether the detainee meets the criteria to be designated as any enemy combatant, and also specifically asked those agencies to provide any information that might suggest the detainee should *not* be designated as an enemy combatant.

b. In some instances, the Team did not directly obtain copies of Government Information from certain intelligence agencies. Instead, upon request, certain agencies allowed properly cleared members of the Team to review the organization's information responsive to their request in order to satisfy the Team's request that the agencies produce reasonably available information under the CSRT procedure. The Team could use infor-

mation the agency authorized from inclusion in the CSRT record to support an enemy combatant status. However, during their review, there were instances where the Team was not permitted to use certain documents as Government Evidence or to make copies of them, because release of these documents could reasonably be expected to cause harm to national security by revealing sensitive information such as sources or methods. These searches were broadly based on names and other available identifying information, and involved voluminous responsive documents, many of which were found not relevant to the determination of whether a detainee continued to meet the criteria for designation as an enemy combatant.

c. In other instances, the Team would submit a request for information to law enforcement agencies; however, these agencies would not always provide the Team with information contained in certain files, due to the fact there was an ongoing investigation. In these cases, the law enforcement agencies would do a search of the information requested and provide the Team with documentation stating that none of the information withheld would support a determination that the detainee is not an enemy combatant.

d. The Team never encountered a situation where an agency objected to the use of information that suggested a detainee *should not* be designated as an enemy combatant.

11. A file of information was gathered as a result of these inquiries, but it did not necessarily include all material that might be considered to meet the definition of

"Government Information" in the CSRT procedures. CSRT Procedures, Enc. 1, § E(3).

a. First, material that might qualify as Government Information from government databases would be reviewed, but might not be collected in a distinct file if it was viewed as being not relevant or only marginally relevant.

b. Second, as explained in Paragraph 10, some material in the possession of intelligence agencies that would likely qualify as Government Information would be reviewed, but could not be collected or used as Government Evidence, because of the sensitivity of the material.

12. In some instances, all of the compiled Government Information referred to in Paragraph 11 above was included in the Government Evidence. In fact, however, the Recorder was required to present to the tribunal only "such evidence in the Government Information as may be *sufficient* to support the detainee's classification as an enemy combatant..." CSRT Procedures, Enc. 1, § H(4) (emphasis added). Therefore in many instances not all of the Government Information was included as Government Evidence. Three primary considerations were employed in selecting the Government Evidence from among this information.

a. First, with respect to information derived from intelligence agencies, those agencies needed to approve the use of their information as part of the Government Evidence before it could be presented to the CSRT, particularly if that information was going to be used in the unclassified portion of the CSRT. If the agency or organization declined to approve the use of information tend-

ing to show that the detainee was an enemy combatant, it was deemed "not reasonably available." Often the primary reason that this information could not be used as Government Evidence is because release of these documents could reasonably be expected to cause harm to national security by revealing sensitive information such as sources or methods. Also, there was a concern about dissemination of this information beyond what was necessary. That said, the Team never encountered a situation where an agency objected to the use of information that suggested a detainee should not be designated as enemy combatant.

b. Second, information was often duplicative of other information. Material was frequently not presented to the CSRT as part of the Government Evidence because it would merely duplicate other information already included in the Government Evidence and therefore would be unnecessarily redundant.

c. Third, the Recorder might elect not to use certain information as Government Evidence if the Recorder determined that other data being used as Government Evidence appeared sufficient to support the detainee's classification as an enemy combatant. For example, if a detainee was alleged to be an enemy combatant based on six actions he was allegedly involved in and these six actions were supported by documents already in the Government Evidence, the Recorder could decide not to include documents about additional actions that the detainee took that would also suggest that the detainee is an enemy combatant. As a result, no Government Information excluded from the Government Evidence was taken into consideration by the CSRT in reaching a determination as to enemy combatant status.

13. The CSRT procedures specify that "[i]n the event the Government Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also provide such evidence to the Tribunal." CSRT Procedures, Enc. 2, § B.1; *see* CSRT Procedures, Enc. 1, § H.4 (same).

a. The Team and Recorder ensured that, as they reviewed Government Information, *all* material that might suggest the detainee should not be designated as an enemy combatant was identified and included in the materials presented to the CSRT and included in the CSRT Record. Thus, the Team and Recorder did not exclude any such material even if it had been originally obtained from other intelligence agencies. They also did not exclude any such material based on any sort of sufficiency assessment. However, if certain information was suggested that the detainee should not be designated as an enemy combatant was duplicative, the Recorder might decide not to include that duplicative information in the Government Evidence.

b. There was one other circumstance where this type of material may be excluded from the Government Evidence—if it did not relate to a specific allegation being made against the detainee. For example, if the government had data that indicated the detainee had engaged in a certain specific combatant activity and also had evidence that he had not engaged in that specific activity, the Team and Recorder could elect to present no data about that specific activity at all. In short, if the Recorder decided not to demonstrate to the CSRT that a specific incident relating to the detainee occurred, the Recorder could decide not to submit evidence to the

CSRT suggesting that the specific incident did not occur.

14. In addition to the Government Evidence, the following factual material was presented to the CSRT and made part of the CSRT record:

(a) material submitted by the detainee or his Personal Representative;

(b) testimony of the detainee or witnesses deemed relevant and reasonably available.

(c) material obtained by the CSRT panel through its own requests for information.

15. After the CSRT deliberated and reached its conclusion, the CSRT determination was reviewed by the CSRT Legal Advisor and the CSRT Director. CSRT Procedures, Enc. 1, § I(7) & (8). If the CSRT concluded, based upon the evidence before it, that the detainee should no longer be classified as an enemy combatant, the CSRT Director would notify the intelligence agencies and provide them an opportunity to submit additional information relating to the detainee or to reconsider any of their prior decisions that had prevented the Recorder from using their material as Government Evidence at the CSRT. Additionally, if the CSRT Legal Advisor or CSRT Director returned the record to the CSRT for further proceedings, the Recorder would have the ability to supplement the material presented to the CSRT as Government Evidence.

16. Both the CSRT Order and CSRT Regulations specifically defined the record as including (among other things) "all the documentary evidence presented to the tribunal" (Government Evidence). CSRT Order, 7 July 2004, para g(3), and CSRT Procedures, Enc. 1., para

I(5). There was no requirement for OARDEC to compile a record of material comprising all of the records in government files that would qualify as Government Information. The Recorder was required only to prepare a "Record of Proceedings" which must include 1) a statement of the time and place of the hearing, persons present, and their qualifications; 2) The Tribunal Report Cover Sheet; 3) the classified and unclassified reports detailing the findings of fact upon which the Tribunal decision was based; 4) copies of all documentary *evidence presented to the tribunal* and summaries of all witness testimony; and 5) a dissenting member's summary report, if any. CSRT Procedures, Enc. 2, § C(8). However, OARDEC made an effort to retain the Government Information as referred to in Paragraph 11, compiled for each CSRT. It is my understanding that despite their efforts, some of these electronic files became corrupted following a technical change-over from one computer system to another in 2005. That has made it difficult to fully recreate the electronic files of Government Information compiled for each tribunal. I also understand that OARDEC is currently working to retrieve stored data from system archives to see if it is possible to recreate the files. As of this date, OARDEC is uncertain whether this is possible.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true, accurate, and correct.

Date: ___ May 2007 /s/ JAMES M. MCGARRAH
JAMES M. MCGARRAH
Real Admiral, Civil Engineer
Corps, U.S. Navy (Retired)
Special Assistant
Office of the Deputy Assistant Secretary of Defense,
Detainee Affairs

(3)

Feb 14, 2008

No. 07-1054

IN THE

Supreme Court of the United States

ROBERT M. GATES, SECRETARY OF DEFENSE, *et al.*,

Petitioners,

v.

HAJI BISMULLAH, et al., and HUZAIFA PARHAT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

John B. Missing
Anupama Connor
DEBEVOISE & PLIMPTON LLP
555 13th Street, N.W.
Ste. 1100E
Washington, D.C. 20004

Jennifer R. Cowan
Philip Rohlik
Keith E. Blackman
Jill van Berg
Andrew Pak
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, N.Y. 10022
(212) 909-6000

Counsel for Bismullah et al.

Sabin Willett
Counsel of Record
Rheba Rutkowski
Neil McGaraghan
Jason Pinney
Sukti Dhital
Samuel R. Rowley
Laura K. Langley
BINGHAM MCCUTCHEN LLP
150 Federal Street
Boston, MA 02110
(617) 951-8000

Susan Baker Manning
BINGHAM MCCUTCHEN LLP
2020 K Street, N.W.
Washington, D.C. 20006
(202) 373-6000

Counsel for Parhat et al.

QUESTIONS PRESENTED

1. Whether the Court should interrupt pending proceedings to review, in advance of its implementation, a preliminary procedural ruling concerning actions brought under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 ("DTA") by detainees incarcerated at the United States Naval Base at Guantánamo Bay.

2. Whether, as the court below held, in an action brought under the DTA, the record on review includes the "Government Information," as defined by the Department of Defense, so as to permit judicial review of whether a detainee's Combatant Status Review Tribunal ("CSRT") was conducted in compliance with applicable regulations, including the regulation requiring that all exculpatory evidence reasonably available to the government regarding the detainee be presented at his CSRT hearing.

PARTIES TO THE PROCEEDING

Respondents here are as follows: (i) Haji Bismullah and his brother Haji Mohammed Wali, acting as next friend, are petitioners below in *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. June 9, 2006); and (ii) Huzaifa Parhat, Abdusabour, Abdusemet, Jalal Jalaldin, Khalid Ali, Sabir Osman, and Hammad Mehmet, along with Jamal Kiyemba, acting as next friend of Abdusabour and Khalid Ali, are petitioners below in *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Dec. 4, 2006), and in Nos. 07-1508, 07-1509, 07-1510, 07-1511, 07-1512 and 07-1523.

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PRELIMINARY STATEMENT

The DTA grants every Guantánamo detainee a defined right to judicial review of the CSRT determination that he is an "enemy combatant." This appeal arises from two DTA cases filed in 2006. The interlocutory decision below held that the record on review in such cases includes the "Government Information" ("reasonably available" information in the government's possession, including all exculpatory evidence, concerning the detainee's combatant status). Department of Defense ("DoD") regulations required a tribunal officer to assemble and consider the Government Information, and to cull and present to a hearing panel any selected incriminating information and *all* exculpatory information. The challenged preliminary ruling is necessary to enable, *inter alia*, judicial review of whether the detainee's status determination was consistent with these regulations.

Arguing that the court of appeals need consider only what was *actually* presented to the CSRT hearing panel, the government seeks to delay DTA cases from proceeding, and convert the judicial review mandated by the DTA into a rubber stamp of the panel's determination. Each Respondent believes he can show that compelling exculpatory evidence was in the government's possession but, in violation of DoD regulations, was not provided to his CSRT hearing panel. If the government's view of the record on review were correct, no court would ever see that evidence.

The government's petition ("Petition") should be denied. First, *certiorari* review is premature, as *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007) ("*Bis-*

mullah I"),[1] is an interlocutory decision concerning the contours of the material to be assembled and no actual record exists.

Second, the decision in *Bismullah I* is correct, and was compelled by the plain terms of CSRT regulations and an act of Congress. The government's position is countertextual and would render judicial review meaningless.

Third, the generalized national-security arguments raised belatedly by the government provide no basis for the Court's intervention now. Those concerns were well understood and fully addressed by the court below, which treated them consistently with the clear language of the DTA. Should any actual issues arise, the court will have ample opportunity to address them as necessary in the context of a particular case.

Fourth, the decisions in *Boumediene v. Bush*, No. 06-1195, and *Al Odah v. United States*, No. 06-1196 (collectively, "*Boumediene*"), will not impact the questions presented here. Respondents agree with the *Boumediene* petitioners that the DTA is a manifestly insufficient substitute for *habeas* regardless of the scope of the record on review in a DTA case. The issue in this case, however, is not the constitutionality of the DTA but its interpretation. And since the Court's decision in *Boumediene* will not result in a *contraction* of

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[1] The government's request for rehearing and suggestion for rehearing *en banc* of *Bismullah I* were denied. Petitioner's Appendix ("PA") 55a-66a, *Bismullah v. Gates*, 503 F.3d 137 (D.C. Cir. 2007) ("*Bismullah II*"); PA 67a-102a, *Bismullah v. Gates*, 2008 WL 269001 (D.C. Cir. Feb. 1, 2008) ("*Bismullah III*").

the record on review, the government, which five months ago urged this Court that DTA cases should be "fleshed out," should not now be permitted to delay Respondents' pursuit of the statutory review to which they are entitled.

STATEMENT

A. Background

1. Haji Bismullah

When the Taliban seized power in Afghanistan in 1996, fifteen-year-old Haji Bismullah and his family fled to a refugee camp in Pakistan. Six years later, Bismullah and his brothers answered Hamid Karzai's call for patriots to return to Afghanistan and join with coalition forces. After Karzai became president of Afghanistan, Bismullah's brother became an aide to a provincial governor, and Bismullah was appointed as a district transportation minister. Respondents' Appendix, filed February 20, 2008 ("RA") 221a-223a ¶¶ 6-13; RA 269a-271a ¶¶ 6-13.

In February 2003, Bismullah went to a U.S. military base to vouch for a detained Afghan official who later was released. Apparently persuaded by a false accusation made by members of a rival clan, our military arrested Bismullah during that visit. Immediately after his arrest, Afghan officials notified U.S. military officials that Bismullah had been mistakenly detained, was not associated with the Taliban or al Qaeda, and supported Karzai and the coalition. Nevertheless, Bismullah was transferred to Bagram Air Base and then to Guantánamo. RA 223a-226a, ¶¶ 14-26; RA 271a-276a, ¶¶ 14-31.

Between the time of Bismullah's arrest and his CSRT, numerous Afghan officials, including the Governor of Helmand province (now a member of the Afghan Senate), told U.S. military and diplomatic officials in Afghanistan, orally and in writing, that Bismullah was an ally detained in error. None of that evidence was presented to Bismullah's CSRT panel, and none is in the government's version of the record on review in his DTA case. Bismullah requested that his brother, who could provide compelling evidence that Bismullah's detention was a mistake, be called as a witness at his CSRT hearing. Then a senior spokesman for a provincial governor and routinely quoted in western media, Bismullah's brother was deemed "not reasonably available." RA 226a-228a, ¶¶ 25-32; RA 236a-237a, ¶¶ 1-4; RA 275a-276a, ¶¶ 27-31.

2. The Uighurs

The *Parhat* Respondents are Uighurs, a Muslim minority group from western China long oppressed by the communist regime. Each fled China to escape that oppression,[2] eventually making his way to a Uighur village—termed a "camp" by the government—in Afghanistan. None contemplated or participated in conflict with U.S. or coalition forces, and none supported forces hostile to the United States. None had even the remotest connection with the attacks of September 11, 2001. When the coalition began a bombing campaign

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[2] The United States has condemned China's human rights abuses of the Uighurs. Department of State, Country Reports on Human Rights Practices—2006, § 1(c) (Mar. 6, 2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm.

in the area, the Uighurs fled to Pakistan, where bounty-hunters sold them to the U.S. military. They were transferred to Guantánamo in approximately May 2002. RA 13a-18a, ¶¶ 35-46, 50-56.

In September, 2002, in a deal with China, the government designated the so-called "Eastern Turkestan Islamic Movement" as a terrorist group. RA 24a.[3] Although Congress never authorized the use of military force against this group, and Respondents' companions at the "camp" were determined to be noncombatants,[4] the *Parhat* Respondents are now held on the theory that they were affiliated with this group.[5] RA 24a, ¶ 77, 42a, ¶ 139.

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[3] Citing statements by senior U.S. officials, the *Parhat* DTA petition details how this political concession was made to induce Chinese cooperation with Iraq invasion plans. RA 21a-24a, ¶¶ 66-77.

[4] The *Parhat* Respondents were companions of five Uighurs whom CSRT panels determined *not* to be enemy combatants. In all respects the facts were the same. Vigorous efforts by the Pentagon to change the non-combatant findings through second panels ensued. This Court is familiar with one such case, involving a sixth companion initially determined to be a noncombatant. A second CSRT overturned that determination, under intense pressure from the Pentagon. *See* Petition for Original Writ of Habeas Corpus, *In re Ali*, No. 06-1194 (U.S. Feb. 12, 2007). Noting that "[the Uighurs] are all considered the same," a Pentagon official wrote, "[b]y properly classifying them as EC, then there is an opportunity to . . . further exploit them here in GTMO. . . . The consensus is that all Uighurs will be transferred to a third country as soon as the plan is worked out." *Id.* at 8.

[5] A description of ETIM appears in the CSRT record of a Uighur companion of these Respondents, which indicates that the ETIM designation was not based on U.S. intelligence but rather on an article posted on the Internet by a Chinese state news agency.

Yet the military had determined that they were not enemy combatants before CSRTs existed. A colonel wrote of Parhat, "it appears unlikely that Parhat will be determined to be an individual subject to the President's military order of 13 Nov. 2001." RA 128a-129a. Public information indicates the existence of other exculpatory evidence. For example, in August 2005, U.S. Ambassador-at-Large for War Crimes Issues Pierre-Richard Prosper stated that the government had already attempted to place the Uighurs in "about 25 countries."[6] Exculpatory statements were made by senior officials, including former Secretary of State Colin Powell and Navy Secretary Gordon England. The records underlying these admissions were "reasonably available," but none was presented to any hearing panel, and none would be part of the government's posited record on review. RA 27a-29a, ¶ 89.

B. The CSRT Procedures And Judicial Review Under The DTA

1. The Legal Framework and Actual Practice

In July 2004, Deputy Secretary of Defense Paul Wolfowitz issued an "Order Establishing Combatant

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The document strongly supports the Uighurs' contention that their enemy-combatant status was the result of a political deal with China. RA 21a-24a, ¶¶ 66-77. Because it is not contained in these Respondents' CSRT Hearing Records, it would be excluded from the record on review advocated by the government.

[6] National Public Radio, Morning Edition, "Chinese Detainees at Guantánamo Get Hearing" (Aug. 25, 2005) (interview with Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes Issues).

Status Review Tribunal" ("CSRT Order"). PA 113a. The Secretary of the Navy followed with an implementation memorandum. PA 120a. Together, these documents comprise the "standards and procedures" that govern the CSRT process (hereinafter, "Procedures"). The CSRTs were held in 2004 and 2005.

The DTA grants the D.C. Circuit jurisdiction "to determine the validity of any final decision of a [CSRT] that an alien is properly detained as an enemy combatant." It directs the court to decide:

> (i) whether the status determination of the Combatant Status Review Tribunal ... was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and
>
> (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

PA 107a-108a, DTA § 1005(e)(2)(C). Thus, at a minimum, the DTA entitles each detainee to challenge whether his status determination was (1) consistent with the Procedures, and (2) based on a preponderance of the evidence.

Below, the government claimed entitlement to the "strongest sort of presumption of regularity" in carrying out the Procedures. Respondent's Motion to Stay,

Parhat v. Gates, No. 06-1397, at 4 (D.C. Cir. Jan. 10, 2007). After oral argument it filed a declaration showing that its practice had in fact been irregular.[7] Additional evidence showed that irregularities were pervasive.[8]

2. The CSRTs

The CSRTs, which the Executive established on its own authority and for its own benefit, *see* PA 118a, § j, involved an expressly nonadversarial process, PA 124a, E-1 § B, including pre-hearing, hearing, and post-hearing steps. The hearing on which the government focuses was only *part* of the CSRT.

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[7] Declaration of Rear Admiral (ret.) James M. McGarrah, PA 225a-239a. Admiral McGarrah directed the Office for Administrative Review of the Detention of Enemy Combatants ("OARDEC").

[8] RA 283a-297a, Declaration of Stephen Abraham, Lieutenant Colonel, United States Army Reserve, *Al Odah v. United States*, No. 06-1196 (U.S. June 22, 2007); RA 301a-310a, Declaration of William J. Teesdale, Esq., *Hamad v. Bush*, No. 05-1009 (D.D.C. Sept. 4, 2007) (quoting CSRT hearing officer); RA 314a-331a, Declaration of Stephen Abraham, *Hamad v. Gates*, No. 07-1098 (D.C. Cir. Nov. 9, 2007). Both below and in the Petition, the government summarized the Procedures' provisions as though they actually were observed. Lt. Col. Abraham and the other knowledgeable declarants contradict these representations. *Compare, e.g.*, RA 183a, Oral Argument Transcript, *Bismullah v. Gates*, Nos. 06-1197 and 06-1397, at 29 (May 15, 2007) (attributing selection of evidence to the Recorder) *with* RA 291a, ¶ 5 ("[T]he Government Evidence was not compiled personally by the CSRT Recorder.").

a. The Government Information

The Procedures required the Recorder—effectively the investigator, prosecutor and clerk of the CSRT—first to "obtain and examine the Government Information," defined as:

> reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings.

PA 129a, 141a-145a, E-1 § E(3), E-2 §§ A(2), C(1). Merely reviewing the Government Information was not sufficient; the Recorder was required to collect it so that the Personal Representative (a non-lawyer who was to "assist" the detainee but not act as his advocate) could review it. PA 132a, E-1 § F(8); *see also* PA 133a, E-1 § G(4) (panel hearing to be scheduled only after Personal Representative "has reviewed the Government Information"). Agencies declining to produce information to the Recorder were required either to provide "an acceptable substitute" or certify that exculpatory information was not withheld. PA 129a, E-1 § E(3), E(3)(a).

The Recorder did none of this. The crucial task of finding Government Information was delegated to contractors with limited training or ability to identify reliable intelligence. PA 227a-228a, ¶¶ 4-5; RA 291a, ¶ 5;

RA 322a, ¶ 36. The contractors were given direct access only to portions of two DoD databases that excluded much classified information. PA 230a, ¶¶ 7, 7(a); RA 292a, ¶ 9. In theory, they could request additional information from outside agencies, but in practice, whether an agency responded depended on "whether anyone at the agency was inclined to do so." RA 319a, ¶ 22. OARDEC rarely lodged a request soon enough for a timely response, RA 319a, 320a, ¶¶ 23, 27, and often received no response at all, RA 319a, 320a, ¶¶ 24, 27. Requests for certifications that no exculpatory information was withheld routinely were ignored. RA 293a, ¶¶ 12-14.

b. The Government Evidence

The Recorder was to select from the Government Information incriminating evidence for the hearing panel ("Government Evidence"). PA 138a, E-1 § H(4). "Evidence" is a euphemism. The Government Evidence consisted primarily of "intelligence products of a generalized nature—often outdated, often 'generic,' [and] rarely specifically relating to the individual subjects of the CSRTs or to the circumstances of those individuals' status." RA 291a-292a, ¶ 8; *see also* RA 324a-325a, ¶ 43. While the Procedures established a presumption that this material was genuine and accurate, PA 136a, E-1 § G11, "[i]nformation relating to the credibility of a source was omitted, making sources appear authoritative even when they were suspect," RA 326a, ¶ 50.[9]

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[9] Accusations against groups appeared in "Government Evidence" without disclosing that the source was a group's political opponent

c. Exculpatory Evidence

With a presumption in favor of incriminating "evidence," the necessity of compliance with regulations regarding *exculpatory* evidence was manifest. The Procedures were clear. If the Government Information included *any* exculpatory evidence, "the Recorder *shall* also separately provide such evidence to the Tribunal." PA 138a, E-1 § H(4) (emphasis supplied). Because detainees had no counsel, no right to know the incriminating "evidence," nor any practical means to gather evidence from overseas, PA 131a, E-1 § F(3)-(5), PA 133a, § G(2); RA 327a, ¶ 55, the Recorder's diligent performance of this duty was crucial. "[T]he Recorder's failure to adhere to the DoD Regulations can influence the outcome of the proceeding to a degree that a prosecutor or an agency staff member cannot; as a practical matter, the Recorder may control the outcome." PA 79a (*Bismullah III*). Yet Admiral McGarrah admitted that OARDEC sometimes withheld exculpatory information. PA 236a, ¶¶ 13a-b. Although compliance with the Procedures is an issue that the court below was expressly tasked to review under the DTA, this violation of the Procedures could never be established under the government's version of the record on review.

d. The Hearing

After the information was collected and reviewed, a hearing was convened before a panel of three military

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or an openly hostile government, points significant to Bismullah and the *Parhat* Respondents. RA 326a, ¶ 50.

officers. The panel was to "determine whether the preponderance of the evidence supports the conclusion that [the] detainee meets the criteria to be designated as an enemy combatant." PA 136a, § G(11). Its determination was subject to approval of the CSRT Director. PA 142a, E-1 § I(8). Uncongenial results were often ordered to be revisited. RA 296a, ¶ 23; RA 308a, ¶ 7(v).

e. Witness Testimony

Although the Procedures expressly allowed witnesses from outside Guantánamo to testify remotely, PA 136a, E-1 § G(9)(c), not a single outside witness was ever permitted to testify. RA 328a, ¶ 58; RA 305a, ¶ 7(i); Mark Denbeaux *et al.*, *No-Hearing Hearings: CSRT, the Modern Habeas Corpus?* at 1 (Nov. 17, 2006), *available at* http://law.shu.edu/news/final_no_hearing_hearings_report. pdf.

f. The Hearing Record

The Recorder was tasked with compiling the record of the *panel* proceedings ("Hearing Record"). This record did *not* include relevant information in the government's possession, or even the Recorder's possession, unless actually presented to the hearing panel. PA 146a, E-2 § C(8). Confining the record on review to the Hearing Record thus would obscure from judicial review any exculpatory material the Recorder failed to assemble, cull, or present.

C. Procedural History

1. The 2006 DTA Filings

Respondents filed their DTA petitions in 2006, and separately moved to compel production of information necessary for the record. In 2007, the court ordered joint briefing on the record on review and a protective order. It held oral argument on May 15, 2007. The government submitted Admiral McGarrah's declaration over two weeks later. PA 225a-239a.

2. *Bismullah I*

On July 20, 2007, the panel unanimously held that the record on review includes the Government Information as defined by the Procedures. PA 2a.

The court also proposed a protective order that included, essentially verbatim, the government's request to submit for *in camera* review material it contends is too sensitive for counsel's review and provides sanctions for violations of the order generally. PA 81a-82a (*Bismullah III*). The protective order was subsequently entered and amended but this provision remained unchanged.

3. *Bismullah II*

In September 2007, the government moved for rehearing and rehearing *en banc*, for the first time making a factual proffer concerning burden and national security through the declarations assembled at PA 182a-224a. The government now asserted that compiling the Government Information would "impose[] an enormous burden" (a change of position, *see* PA 64a; previously the government said its review of Government Information was so routine as to merit a pre-

sumption of regularity), and would cause "exceptionally grave damage to national security." Petition for Rehearing and Suggestion for Rehearing *En Banc* at 7, *Bismullah v. Gates*, Nos. 06-1197, 06-1397 (D.C. Cir. Sept. 7, 2007) (quotation omitted). The panel reviewed the declarations and denied reconsideration, noting that *Bismullah I* had simply "adopt[ed] the definition of Government Information exactly as it appears in the DoD Regulations themselves." PA 59a. The security concerns had also been addressed: "[we] provid[ed], just as the Government urged, that it may withhold from the [Respondents'] counsel any Government Information that is either 'highly sensitive information, or . . . pertain[s] to a highly sensitive source or to anyone other than the detainee.'" PA 64a.

4. *Bismullah III*

On February 1, 2008, the full court of appeals denied the government's request for rehearing *en banc*. Chief Judge Ginsburg responded to a new contention, appearing for the first time in Judge Randolph's dissent, that 28 U.S.C. § 2112(b) defines the record on review. PA 71a-72a.

REASONS FOR DENYING THE PETITION

A. The Petition Should Not Be Held.

Respondents urge the Court to consider and deny the Petition, and *not* to hold it. The Petition is both premature and meritless and should be denied now so that Respondents may proceed with their DTA cases.

B. *Certiorari* Review Is Premature.

Bismullah I is an interlocutory order regarding information to be included in the record on review. It falls well outside the normal scope of orders for which *certiorari* review is granted. *See, e.g., Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (*per curiam*); *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of *certiorari*); *Société Nationale Industrielle Aérospatiale v. United States Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 527 (1987). Because there is no actual record in any case, as Judges Rogers and Brown agreed, the question of what actually would go into a specific record on review remains open. PA 30a, 99a.

Every interlocutory appellant argues that its concerns must be reviewed immediately, lest inconvenience or injustice ensue. The principle of the final judgment rule recognizes that the greater harm lies in systemic delay, *In re Briscoe*, 448 F.3d 201, 214-15 (3d Cir. 2006), a harm that is compounded when this Court is asked to spend its scarce adjudicatory resources reviewing preliminary procedural orders. The government's claim for an exception boils down to the assertion that it would be required to undertake a larger search and place into a secure facility a larger record than would be the case if the decision is reversed. Not only is its claim of interlocutory harm unpersuasive, as further discussed below, but the burden it asserts is minimal compared to the burden that delay imposes on Respondents who remain imprisoned.

While this Court is not subject to the final judgment rule, 28 U.S.C. § 1291, the strong policy of the rule militates against a grant of *certiorari* review here.

Cobbledick v. United States, 309 U.S. 323, 325 (1940) ("Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration . . . . To be effective, judicial administration must not be leaden-footed."); *Flanagan v. United States*, 465 U.S. 259, 264 (1984). *See also Canter v. Am. Ins. Co.*, 28 U.S. 307, 318 (1830).

In 2004, this Court directed the district courts to "consider in the first instance the merits" of the *habeas* cases. *Rasul v. Bush*, 542 U.S. 466, 485 (2004). District judges declined to do so (in the leading case, a stay entered even after the court found that good claims had been stated).[10] Cases did not proceed through the system, noncombatant detainees suffered, the Executive never obtained the benefit of favorable adjudications, facts were not established, and Congress enacted legislation premised on the CSRT process without knowing what actually happened in it. Years later, the judicial branch finds itself without a single case even briefed. A grant of the Petition would simply prolong this unfortunate history.

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[10] *See In re Guantánamo Detainee Cases*, Nos. 02-CV-0299 (CKK) *et al.*, 2005 U.S. Dist. LEXIS 5295 (D.D.C. Feb. 3, 2005), an approach followed by all district judges.

C. The Petition Should Be Denied Because The Decision Below Is Correct.

1. The Decision Below Correctly Construed the DTA.

The government cannot apply the administrative-law definition of the record without also importing the protections provided to individuals subject to agency action. Since none of those protections was granted to detainees in the CSRT process, the record on review is not defined by 28 U.S.C. § 2112(b) or analogies to administrative law, but by the DTA and its internal reference to the Procedures. Even if section 2112(b) were relevant, its terms, and general administrative-law principles dictate that the record on review should include the Government Information.

When statutory terms are plain and not absurd, courts are bound to enforce them. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

The terms are plain here.[11] The statute requires review of whether the status determination was "consistent with the standards and procedures specified by the Secretary of Defense." PA 107a-108a, DTA § 1005(e)(2)(C). Among those Procedures is the requirement that the "reasonably available" information in the government's possession be reviewed, and that all exculpatory evidence be presented to the hearing

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[11] For this reason, the government's reliance on legislative history is misplaced. *United States v. Gonzales*, 520 U.S. 1, 6 (1997).

panel. Without access to the Government Information, the court cannot determine whether that occurred. PA 58a-59a (*Bismullah II*).[12] As Chief Judge Ginsburg noted in *Bismullah III*, to rely on a more narrow record "would render utterly meaningless judicial review intended to ensure that status determinations are made 'consistent with' the DoD Regulations." PA 78a.

The government never explained how the court was to carry out this review function, except by indulging a presumption of regularity. Its proposed record would make that presumption irrebuttable, for without the Government Information, the Recorder's actions would forever remain secret. PA 14a-15a (*Bismullah I*). Moreover, whatever notion of regularity survived the "unsettling" factual record below, PA 30a-31a, was abandoned in the Petition. The government asserts that it "likely" cannot comply with the court's order and collect the Government Information as defined in the DTA, which is effectively an admission that it did not comply with the Procedures in 2004. Pet. 19.[13]

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[12] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), involved the kind of controlled record the government again urges for DTA review. *Id.* at 512-14 (describing Mobbs Declaration). After remand from this Court, when preliminary rulings in the district court threatened to expand that record, the government quickly released Hamdi to the Kingdom of Saudi Arabia. *See* Joseph Margulies, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 156 (2006). Yaser Hamdi is a free man today.

[13] *See* PA 76a n.5 ("The record before the court suggests the Recorder has not always fulfilled his obligations under the DoD Regulations.").

The government's contention here is also inconsistent with its admission below that the Hearing Record is an inadequate basis for DTA review of whether the CSRT's determination was based on a preponderance of the evidence. In late October 2007, the government finally disclosed the Hearing Record in Huzaifa Parhat's case. On receipt, counsel sought summary disposition, arguing that the Hearing Record demonstrates as a matter of law that none of the allegations against Parhat would make him an "enemy combatant."

In opposing, the government argued that if the lower court determined that the Hearing Record was insufficient, the government should be permitted to conduct another CSRT because "in any given case there may be additional evidence against a petitioner that supports an enemy combatant determination, but which was never presented to the Tribunal" and thus was not part of the Hearing Record. Corrected Brief for Respondent at 56-57, *Parhat v. Gates*, No. 06-1397 (D.C. Cir. Feb. 8, 2008). This argument admits the correctness of Chief Judge Ginsburg's conclusion that the court cannot make the preponderance determination based on the Hearing Record: even the government says there "may be additional evidence" relevant to the preponderance issue.[14]

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[14] The government's view of the record is so restrictive as to raise inter-branch issues that should not be addressed without a more complete record. "[T]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial ac-

2. Principles of Administrative and Criminal Law Do Not Require Review of the Decision Below.

The government never claimed below that the CSRT was an "administrative agency"; it argued only that the Administrative Procedure Act ("APA") and administrative law applied by "analogy." RA 180a; Pet. 20-21. Seizing on a theory first posited by Judge Randolph in his dissent to *Bismullah III*, the government now claims that 28 U.S.C. § 2112 "applies by its plain terms" to limit the record on review to the Hearing Record. Pet. 20-21.[15] But none of the safeguards that assure the reliability of agency hearing records was present during the CSRT process, which was indeed *sui generis*. PA 74a. Detainees were forbidden from seeing the evidence against them and hence unable to lodge responses in the record. PA 78a. Exculpatory information might reach the CSRT panel only through the fortuity of its presence in government

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tion." *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (dictum); *see Kent v. United States*, 383 U.S. 541, 560 (1966) (meaningful review "should not be remitted to assumptions"); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). To base a judicial ruling on a matter as grave as indefinite imprisonment on a presumption of regularity—particularly given the evidence of pervasive irregularity here—would indeed be to cloak the Executive's work in "the neutral colors of judicial action." *Mistretta*, 488 U.S. at 407.

[15] Absent from oral argument, and never mentioned in *three rounds* of briefing below, the argument was waived. *United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981). Sound exercise of discretion militates against granting interlocutory *certiorari* review on the basis of an argument that was not previously raised by the petitioner.

hands and the faithful conduct of the Recorder. PA 75a-76a.

Since "a CSRT's status determination is the product of a necessarily closed and accusatorial process in which the detainee seeking review will have had little or no access to the evidence the Recorder presented to the Tribunal, little ability to gather his own evidence, no right to confront the witnesses against him, and no lawyer to help him prepare his case, and in which the decisionmaker is employed and chosen by the detainee's accuser," to allow the government to withhold the Government Information from the court would mean proceeding "as though the Congress envisioned judicial review as a mere charade when it enacted the DTA." PA 78a-79a.

a. Section 2112 Does Not Define the Record on Review.

Section 2112 discusses appellate review of orders of "*administrative* agencies, boards, commissions, and officers." 28 U.S.C. § 2112(a) (emphasis supplied). Section 2112(b), which defines the "record on review" to be filed in an appeal of "such a proceeding" (*i.e.*, one described in subsection (a)), uses the word, "agency" as shorthand for "administrative agency," as used in subsection (a). This reading finds support not only in the plain text, but in the definition of "agency" in 28 U.S.C. § 451, which includes both "commissions" and "boards." Thus, when section 2112(b) includes "agency, commission and board" in its list, "agency" must mean "administrative agency."

Unwilling to provide detainees with the procedural protections guaranteed under the APA, *see* PA 74a, the

government cannot now rest on administrative law to limit the record on review. If its new argument is correct, and the record limitations of section 2112(b) apply to the DTA, then the CSRT *is* an agency subject to the APA, because, as Judge Ginsburg explained, none of the exclusions to the definition of "agency" in 5 U.S.C. § 551 applies. PA 74a. If that were so, then Respondents were entitled to the full suite of procedural protections enjoyed by litigants before administrative agencies, including the parties in the government's cases discussing the record on review. *See* Pet. 20.

Had Congress intended section 2112 to define the DTA record on review, it could have referenced section 2112 expressly, as statutes often do. *See* 28 U.S.C.A. § 2112 Cross References (citing numerous statutes invoking section 2112). Regardless, a general right-of-review provision not cited in the DTA does not supersede the specific scope of judicial review mandated by the DTA. *See* PA 76a.

b. If Administrative Law Were Applicable, the Record on Review Would Include the Government Information.

Even if administrative-law principles applied by implication, or section 2112 applied expressly, the record on review would include the Government Information. The Recorder, who was an integral part—indeed, the cornerstone—of the CSRT, was *required* by the Procedures to collect and review *all* Government Information. PA 145a, E-2 §C(1). The CSRT was deemed to have access to and to have reviewed all Government Information through the Recorder. PA 116a, § g(7); PA 129a, § E(3). Thus, material the Re-

corder saw or should have seen constitutes material "directly or indirectly considered" by the "agency," *i.e.*, the CSRT. *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993).

Section 2112(b) itself requires that when a question of fact is being reviewed, the record include "all of the evidence before the agency." The DTA expressly authorized the court below to question the CSRT's factual findings. PA 107a, DTA § 1005(e)(2)(C)(i); *see also NLRB v. Fruehauf Corp.*, 720 F.2d 1398, 1401 (5th Cir. 1983) ("regardless of the Board's procedures," section 2112(b) requires material considered by the investigator but not by the decision-making Board to "be part of the record before this court when it considers petitions for enforcement or review").

Furthermore, courts have not hesitated to consider a record broader than the one defined by the agency where there is evidence that the agency failed to create a complete record. *See, e.g., Kent County v. EPA*, 963 F.2d 391, 396 (D.C. Cir. 1992) (administrative record included documents "not before the agency when it made the decision" where agency was "at least negligent in failing to discover" documents). The CSRTs were non-adversarial proceedings in which the Recorder had exclusive power over the record, and there is strong evidence that the Recorder failed to create a complete record.

Courts also review all the material before the agency where serious questions arise whether the agency followed its own procedures. *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989). The evidence more than establishes such questions here. If applicable, core administrative-law principles would require pro-

duction of the Government Information as necessary for performance of the judicial review mandated by Congress in the DTA.

c. Analogies to Criminal Law and Army Regulation 190-8 Are Unavailing.

As explained in *Bismullah II*, attempts to analogize the CSRT process to criminal proceedings and Army Regulation 190-8 must fail. PA 59a-60a. The court must look to the language of the DTA for the record on review. The proposed analogies involve different regulations or statutes and a different balance of due process and inherent protections in the initial determination.

Brady v. Maryland, 373 U.S. 83 (1963), is unavailing for exactly that reason. The constitutional obligation to produce a more limited universe of exculpatory material in a criminal proceeding arises in a context in which the defendant has a full panoply of procedural protections—among them, the right to counsel, pretrial discovery procedures, and every opportunity to confront incriminatory evidence and respond to it by adding to the record. A detainee has none of that; the government controls the entire CSRT process. To invoke *Brady* in a Respondent's seventh year of uncharged indefinite imprisonment is remarkable.

Similarly, in *Hamdi v. Rumsfeld*, 542 U.S. 507, 529-33 (2004), the plurality interpreted the Constitution, not a statute, and constructed a procedural framework by applying *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Court's path here is dictated by the DTA's terms, and particularly its mandate that the court of appeals exercise meaningful oversight of the government's

compliance with the Procedures. The Government Information is plainly required for the court to fulfill that role.

Hearings under Army Regulation 190-8 are held in the field soon after capture, when percipient witnesses are available. The CSRTs operated on the basis of unsourced hearsay, years after the fact, and while under extreme command pressure.

D. The Government's Claims Of National-Security Risk Provide No Basis For The Court's Intervention In This Case.

The government expresses two concerns about national security: (i) concerns about *burden*—namely, time and effort needed for compliance, and (ii) concerns about *secrecy*—to wit, the consequences of disclosure to counsel. Each concern was fully and fairly addressed below, by a court to whose institutional competence such questions are regularly entrusted.

1. Claims of Undue Burden Provide No Basis To Rewrite a Statutory Obligation.

The Court cannot relieve a party from requirements imposed by Congress even if it believes them to be unduly burdensome. *EchoStar Satellite L.L.C. v. FCC*, 457 F.3d 31, 41 (D.C. Cir. 2006); *see also South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 895 (D.C. Cir. 2006). Grounded in the separation of powers doctrine, this principle applies equally in this Court. *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

The government asks this Court to rewrite the DTA, although Congress declined to do so when it amended other portions of the statute. *See* Military

Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2635-36 (amending portions of the DTA after Bismullah first made record requests). The government improperly seeks to have this Court legislate what Congress did not. *Dodd v. United States*, 545 U.S. 353, 359 (2005).[16]

2. The CSRT Procedures and Rulings Below Amply Protect the Government's Interests.

Whether the subject is a terrorist trial, a government contract with a manufacturer of Uranium-238, or the detention of a civilian in Guantánamo, no court more regularly addresses national-security concerns than the D.C. Circuit.[17]

The government's concerns were carefully addressed by that court. First, under the Procedures, an agency *already* can decline to produce material (thus rendering it not "reasonably available") if it provides an adequate substitute or certifies that the information is not exculpatory. PA 129a, E-1, § E(3)(A). This eliminates the need for the time-consuming pre-

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[16] These cases do not warrant *certiorari* review, as no burden was shown as to these Respondents. The government advised in August that it was "expending significant resources actively gathering and reviewing material that might be treated as part of the record in this case and other cases filed under the DTA," Resp't Opp. to Dates Proposed in Mot. for Entry of Scheduling Order at 7-8 (filed Aug. 22, 2007), but the government's submissions identify no specific burden associated with these Respondents.

[17] Congress regularly reposes authority and discretion in this area on that court. *See* 8 U.S.C. §§ 1535(a), (b); 8 U.S.C. § 1189(c); D.C. Cir. Rules 47.6(a), (d). *See also* Classified Information Procedures Act, 18 U.S.C. App. 3 §§ 1-16.

disclosure review of which the government complains.[18] Second, the protective order permits submission for *in camera* review of any material the government contends is too sensitive for counsel's review. PA 81a.[19] Third, it imposes sanctions for any violations of confidentiality. PA 51a. Where those tools are inadequate, case-by-case amendments of the protective order or other prehearing procedures may be considered in a specific DTA case.

The government never explains why these tools are inadequate. The Hearing Records contain Government Information—just not all of it—and therefore should already contain information quite as sensitive as the omitted material.[20] Since 2004, Hearing Records, in the form of *habeas* returns, have been shared with scores, perhaps hundreds of *habeas* counsel. The government never sought to make a record below explaining why this system, which has worked since 2004, would not continue to work.

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[18] The government claims that it has "always sought in good faith to provide Tribunals with any pertinent . . . exculpatory information." Pet. 25. As it is now clear that all exculpatory information was not provided during the 2004 CSRTs, the government should have no objection to conducting the relevant searches now.

[19] In the context of claims of governmental privilege, the Court has held that *in camera* review "is a highly appropriate and useful means of dealing with [such] claims." *Kerr v. United States Dist. Court*, 426 U.S. 394, 405-06 (1976); *United States v. Nixon*, 418 U.S. 683, 706 (1974).

[20] If the Hearing Records contain *less* sensitive information than the Government Information, that suggests that the 2004 searches were not properly conducted and highlights the need for swift adjudication of DTA cases with full records on review.

Any burden is due to the government's failure to comply with its own Procedures. The government knew in 2004 that the CSRTs would be subject to litigation. Although the DTA had not yet been enacted, the CSRTs were implemented immediately after *Rasul*. Had the government collected the Government Information, as the Procedures required, and retained it, production of the required records now would entail minimal effort. The government's failure to comply with the Procedures in 2004 should not relieve it of its statutory obligations today.

3. The Context

The government's national-security alarums arose only after adverse judicial rulings.

When it filed its opening brief below, the government did not describe any threat to national security. Indeed, at oral argument it suggested that national-security concerns were manageable, assuring the court that *ex parte* submissions required to protect that interest would be minimal. RA 204a.

The first declaration was filed only *after* oral argument. PA 225a. It disclosed no national-security risk except at paragraph 12a (averring that government information was sometimes withheld because it "could reasonably be expected to cause harm to national security by revealing sensitive information such as sources and methods"). PA 235a. There the matter stood through June and most of July. The government filed no other declarations.

Bismullah I issued on July 20. The court invited, and the parties provided, comment on the proposed protective order, with no changes to its *ex parte* provi-

sions. In October, the court further amended the order following its review of the public versions of the security declarations.

Only after briefs, an oral argument, a post-argument declaration, and an adverse decision did the government file the suite of new declarations in September. PA 182a-224a.

4. Averments of the Declarations

The panel closely reviewed the averments in the publicly filed declarations. On October 3, 2007, it found that they did not counsel a different result on the record on review. PA 55a-66a.

a. The Claimed Burden

As Chief Judge Ginsburg noted, the practical issue was the burden of compliance, not any real risk to security, PA 60a, and burden is not sufficient, PA 60a-63a.

But claims of burden were overstated. For example, CIA Director Hayden says that the CIA may have to produce "tens of thousands" of "highly classified documents." PA 184a. There are approximately 180 DTA petitioners. If "tens of thousands" means (hypothetically) 50,000, there may be fewer than 300 documents per detainee. For all we can tell, as to many detainees, there may be no "highly classified" documents at all.

Most of the Government Information is readily available, including apprehension reports, interrogations logs and the interrogators' "knowledgeability

briefs."[21] The government was able to hold 558 CSRTs within just a few months, beginning in August 2004, when national-security concerns were certainly no less severe.[22] Its ability to act quickly then suggests either that its claims are rhetorical now, or that in 2004 its irregularities were massive. If the latter, it is all the more urgent that the situation be remedied and that the cases proceed on a full record.

Director Hayden says that many CIA documents reveal clandestine and covert intelligence activities. PA 185a-186a. Yet since 2004 such materials have been disclosed to security-cleared *habeas* counsel in a secure facility. Nothing should be different about the sensitivity of the current material. There simply would be more of it.

b. "Reasonably Available"

Bismullah I ordered only the production of what is reasonably available. PA 2a. FBI Director Mueller's description of burdens attending FBI computer searches, PA 192a-193a, is a contention as to what is "reasonably available," as is NSA Director Alexander's discussion of signal intelligence, PA 204a-205a. The thousands of hours of research Secretary England identifies, PA 218a-222a, may be a similar contention, or

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[21] *See, e.g.*, Memo. in Supp. Pet. Mot. for Preservation Order, *El Banna v. Bush*, No. 04-CV-1144 (D.D.C. Dec. 5, 2005) (RWR) (detailing types of documents believed to be in the government's possession).

[22] *See, e.g.*, Sara Wood, Tribunals Held for High-Value Detainees at Guantánamo, Mar. 12, 2007, *available at* http://www.defenselink.mil/news/newsarticle.aspx?id=3346.

may evidence a fruitless effort to find some basis for detention in a specific case. The government is certainly free to assert its claims in individual litigations. If so, the court will adjudicate them. But in the absence of concrete claims anchored to a specific record, the generic affidavits proffered by the government provide no basis for sound judicial decisionmaking.

c. Source Compromise

Director Hayden avers that disclosure of some CIA information might compromise foreign intelligence services and confidential sources, or dissuade them from future cooperation. PA 186a. Director Mueller makes a similar point. PA 196a. The thesis ignores the option, in an appropriate case under the Procedures, to produce a certificate or suitable replacement. Again, arguments like this can only be addressed in the context of specific cases.

d. Disclosure to Counsel

Director Hayden sees danger in disclosure of information to security-cleared counsel. PA 187a-188a. Yet lawyers practicing in the federal courts often receive highly classified information. The trials of the shoe bomber in Boston, the millennium bomber in Seattle, and Zacharias Moussaoui in Northern Virginia are recent cases in which classified information was disclosed to defense counsel, without compromising national security. *See* Sarah Kershaw, *Terrorist in '99 U.S. Case Is Sentenced for 22 Years*, N.Y. TIMES, July 28, 2005, at A20; Eric Lichtblau, *Judge Rules 9/11 Defendant is Competent to Plead Guilty*, N.Y. TIMES, Apr. 21, 2005, at A14; Associated Press, *Life Sentence for Shoe Bomber/"We are not afraid," Judge tells him*, NEWSDAY,

Jan. 31, 2003, at A06. Congress knew, when it enacted the DTA, that it was creating judicial review. That meant that lawyers would have access to classified information.[23]

e. Concerns Since Resolved

Director Mueller raised certain logistical concerns regarding classified information, PA 197a, that were thereafter addressed by the court below in revisions to its protective order dated October 23, 2007, PA 45a-49a, a measure that, as Director Mueller concedes, "would alleviate some of the FBI's concerns," PA 198a.

f. Irrelevant Argument

Director of National Intelligence McConnell and General Alexander describe the appalling crimes of 9/11, and the latter adds a section about a "global war on terror." PA 201a. But these declarants add nothing specific about national security other than the point about signal intelligence.

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In sum, the declarations do not justify this Court's intervention. *Of course* national security is involved, as Congress well knew when it enacted the DTA. And there may be issues left to litigate in other DTA cases about specific records. But none of this justifies this Court's intervention in the careful work performed by

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[23] Admiral McGarrah's declaration disclosed that Government Information was reviewed in the first instance not by skilled intelligence officers, but by newly hired contractors with two weeks' training. PA 227a-230a. Subcontracting this work hardly suggests alarm about security matters.

the institutionally proper court to impose safeguards necessary to protect national security. *See, e.g., Nat'l Council of Resistance of Iran v. Dep't of State*, 373 F.3d 152, 154 (D.C. Cir. 2004) (exercising its exclusive jurisdiction to review appeals of designated "foreign terrorist organizations" under 8 U.S.C. § 1189(a)(1)); *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983) (recognizing executive competency in national security, but holding that "to ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue to critically examine instances of its invocation"); *Halperin v. Kissinger*, 606 F.2d 1192, 1199 (D.C. Cir. 1979) ([W]hen presented with a "conflict between the Government's need to act decisively to safeguard the nation's security and those individual rights that are implicated . . . . We must carefully consider any impact that its decision might have on the nation's ability to defend itself."), *aff'd per curiam*, 452 U.S. 713 (1981).

E. The *Habeas* Appeals Provide No Basis For The Court's Intervention Here.

The government argues that these cases are "in significant respects intertwined with the threshold issues pending before the Court in *Boumediene*," Pet. 13; that "[t]he outcome in this case may be directly affected" by this Court's disposition of the *habeas* appeals, *id.* at 17; and, therefore, that "the Court should hold this petition pending *Boumediene*," *id.* at 19.

The government first raised the purported linkage between these cases and the *habeas* appeals five months ago, but in a very different way. At that time, the statute and the regulations were what they are today. The *habeas* appeals were pending, just as they are to-

day. *Bismullah I* defined the "record on review" just as it does today, to include the entirety of the Government Information.[24]

Yet what the government told this Court it should do about purported "intertwining" then was *the precise opposite* of what it says today. "If this Court determines that [the *habeas*] petitioners have Suspension Clause rights and that *habeas* would have been available to them at common law," the government wrote, "it should decline to rule on the adequacy of the DTA at this time, *but instead require them to exhaust their available DTA remedies.*" Brief for Respondents at 41, *Boumediene v. Bush, Al Odah v. Bush*, nos. 06-1195, 06-1196 (U.S. Oct. 9, 2007) (emphasis supplied). It was full speed ahead in the DTA proceedings: "This Court should not attempt to evaluate the adequacy of the DTA until the District of Columbia Circuit has had an opportunity to construe the statute *and this Court can examine its operation in a concrete setting.*" *Id.* (emphasis supplied). *Habeas* should be stalled, the government argued, while "important questions . . . as to the scope of review" in a DTA case were "fleshed out on a case by case basis." *Id.* "Case by case," "concrete setting," "exhaustion": the drumbeat was unmistakable. *Habeas* appeals must stand aside while cases moved to decision under the DTA.

That was then. In the *habeas* appeals, the government urged this Court to defer to the DTA; now it urges the same Court—by seeking *certiorari* review of an interlocutory ruling, no less—to defer the DTA to

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[24] *Bismullah II* was decided six days earlier. PA 55a.

habeas. There is a consistency here, and has been since 2004: all progress, in all cases, should simply be frozen. But neither argument is sound, because the cases present different issues. There is no reason that any *habeas* petitioner should have to exhaust DTA remedies, and the DTA cannot be converted into *habeas* through exhaustion. Conversely, there is no reason for this Court to delay Respondents' pursuit of the review that the DTA provides. DTA cases like this one turn on questions of statutory, not constitutional, construction, a determination made based on the statute's text and function.

The government suggests that the Court might construe the DTA in *Boumediene* to "avoid" any constitutional difficulty. Pet. 13. How such a construction could *contract* the record is a mystery. If the *Boumediene* petitioners prevail, there is a constitutional right to *habeas*, and contracting the record will hardly create an adequate substitute. If the government prevails, no question of constitutional avoidance arises. The government's position in *Boumediene* underscores the urgency of progressing cases under the DTA, which it says is the only judicial review available. Further delaying access to that review is unconscionable.

Nor is the question whether the government might hold new CSRTs rather than produce records on review in DTA cases a link between this case and *Boumediene*. No aspect of *Boumediene* would require the government to institute new CSRTs, and no party to *Boumediene* asked for them. The only decision that contemplates new CSRTs is *Bismullah II*, which mentions the possibility only as an alternative to producing

the Government Information.[25] Thus, the possibility of further CSRTs under the DTA regime does not justify linking these cases with the *habeas* appeals.

Respondents agree with the *Boumediene* petitioners that the DTA is unconstitutional because it does not provide a remedy remotely equivalent to the *habeas* review to which they are entitled. Respondents, however, are entitled to their statutory review, and there is no scenario in which this Court's ruling in *Boumediene* will constrict the contours of that review. Allowing the government to tie its Petition seeking to narrow the statute to the disposition of cases not presenting that issue simply interposes yet more months of delay before Respondents can obtain any review of their imprisonments.

The government suggests that a ruling in *Boumediene* would "highlight the importance of the procedures for DTA review." Pet. 13. Huzaifa Parhat is in Camp 6—the issue needs no highlighting for him. One suspects that, with 180 cases now stalled, the court below needs no highlighting either.

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[25] The concept of new CSRTs has never made sense. If a new CSRT is convened, the government will have the same obligation to assemble the Government Information, and the same obligation to place all exculpatory evidence before the panel. The posited burdens in assembling this material would be unchanged. The "risks" to national security through counsel access in subsequent DTA review would be the same. It would be no easier to assemble the material for a CSRT than it would be to assemble it for the record on review in a DTA case.

CONCLUSION

For the foregoing reasons, the Court should not hold the Petition and should deny it.

Respectfully submitted,

John B. Missing
Anupama Connor
DEBEVOISE & PLIMPTON LLP
555 13th Street, N.W.
Ste. 1100E
Washington, D.C. 20004

Jennifer R. Cowan
Philip Rohlik
Keith E. Blackman
Jill van Berg
Andrew Pak
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, N.Y. 10022
(212) 909-6000

Counsel for Bismullah et al.

Sabin Willett
Counsel of Record
Rheba Rutkowski
Neil McGaraghan
Jason Pinney
Sukti Dhital
Samuel R. Rowley
Laura K. Langley
BINGHAM MCCUTCHEN LLP
150 Federal Street
Boston, MA 02110
(617) 951-8000

Susan Baker Manning
BINGHAM MCCUTCHEN LLP
2020 K Street, N.W.
Washington, D.C. 20006
(202) 373-6000

Counsel for Parhat et al.

Dated: March 3, 2008

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FILED
MAR 11 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 07-1054

In the Supreme Court of the United States

ROBERT M. GATES, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

HAJI BISMULLAH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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REPLY BRIEF FOR THE PETITIONERS

This case concerns the scope of the record for review of enemy combatant determinations under the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, § 1005(e)(2), 119 Stat. 2739. That important question split the court of appeals, generated five separate opinions on petition for rehearing en banc, and is interconnected with the issues now pending before the Court in *Boumediene* v. *Bush* and *Al Odah* v. *United States*, Nos. 06-1195 & 06-1196 (argued Dec. 5, 2007). Respondents' extensive merits discussion, see Br. in Opp. 17-25, only underscores the importance and complexity of the question presented. Accordingly, the Court should hold this case pending the disposition of *Boumediene* and *Al Odah* or grant certiorari and order expedited briefing and oral argument.

A. The Question Presented Is Important And Intertwined With The Questions In *Boumediene* And *Al Odah*

1. Respondents do not dispute the importance of the question presented in this case. To the contrary, their near-exclusive focus on the merits emphasizes the centrality of that question to DTA review and demonstrates the critical need for this Court's intervention. See Br. in Opp. 17-25. The court of appeals' 5-5 split on rehearing en banc, in five separate opinions (several of which emphasized the need for this Court's review), Pet. App. 67a-102a, as well as the decision of one Judge on the original panel to urge the court to hear the case en banc, *id.* at 83a-89a (Henderson, J., dissenting from denial of rehearing en banc), likewise underscores the importance of the issues raised by this case.

At the same time, as this Court and several Judges of the court of appeals recognized, the question presented here is interconnected with the questions now before the Court in *Boumediene* and *Al Odah*. See *Boumediene* v. *Bush*, cert. granted, 127 S. Ct. 3078; Pet. App. 82a (Ginsburg, J., concurring in denial of rehearing en banc); *id.* at 83a (Garland, J., concurring in denial of rehearing en banc); *id.* at 89a n.6 (Henderson, J., dissenting from denial of rehearing en banc); *id.* at 96a (Randolph, J., dissenting from denial of rehearing en banc). Respondents recognize as much, because they argue throughout their brief about the adequacy of DTA review, Br. in Opp. 2, 11, 20-21, 23-25, 26, which is central to the issues pending in *Boumediene* and *Al Odah*.

Respondents hypothesize (Br. in Opp. 35-36) various ways in which this Court could decide *Boumediene* and *Al Odah* that would minimize the decision's impact on this case. But they acknowledge (Br. in Opp. 1) that this

case, like *Boumediene* and *Al Odah*, raises critical issues about the scope of judicial review available to Guantanamo Bay detainees, and this Court's decision in *Boumediene* and *Al Odah* will clarify how judicial review for detainees must proceed, see Pet. 18-19. Holding this case for the Court's decision in *Boumediene* and *Al Odah* is a modest and common-sense response to the court of appeals' decision. See Pet. 29-32; pp. 8-11, *infra*.

2. Contrary to respondents' repeated assertions (Br. in Opp. 1, 3, 16, 34-35), the government is not seeking certiorari review for purposes of delay. The government sought expedited rehearing en banc before the court of appeals and sought expedited consideration of the petition for a writ of certiorari and the merits of this case, so that this case may be decided this Term. Respondents have consented to such a schedule. Even if this Court were to hold this case pending its decision in *Boumediene* and *Al Odah* and then grant the petition, vacate the decision below, and remand the case to the court of appeals, briefing in the court of appeals could proceed on an expedited basis—in a matter of months. And the Court's decisions in *Boumediene* and *Al Odah* presumably will streamline, perhaps substantially, the issues in the subsequent litigation.

In the meantime, respondents may proceed with judicial review based on the existing CSRT record. The government has already provided to all but one of the respondents in this case the evidence that was presented to and considered by the CSRT, including classified material.[1] Shortly after receiving those classified CSRT

[1] Material was not provided to counsel regarding respondent Abdusabour, because counsel has not provided adequate evidence of their authority to represent Abdusabour. See Pet. App. 42a (protective order).

records, five of the respondents asked the court of appeals to dispose of their cases based upon those records. In the first of those cases, *Parhat* v. *Gates*, No. 06-1397, the court of appeals ordered immediate merits briefing, which is now complete, and expedited oral argument, which is currently scheduled for April 4, 2008. Respondents are thus wrong in claiming (Br. in Opp. 16) that "the judicial branch finds itself without a single case even briefed." Indeed, as explained below, pp. 5-7, *infra*, respondents can obtain meaningful DTA review on the records they have already received.

B. The Court Of Appeals' Decision Is Fundamentally Flawed

1. Respondents have not disputed—and cannot dispute—that the court of appeals' conception of the record on review goes well beyond any known administrative or judicial context. Settled principles of administrative law, reflected in 28 U.S.C. 2112, make clear that judicial review is generally limited to the record before the initial decisionmaker. Pet. 20-21. Yet the court of appeals found that Guantanamo Bay detainees are entitled to procedural protections greater than those afforded by the Constitution to United States citizens in the criminal context, see *Brady* v. *Maryland*, 373 U.S. 83 (1963), and in the enemy-combatant context, see *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 513-539 (2004) (plurality opinion). Respondents attempt to justify that anomalous result by explaining that they deserve greater procedural protections than citizens because they believe DTA procedures are inadequate and they suspect Congress felt the same way. Br. in Opp. 20-21, 24-25. But respondents' repeated attacks on the DTA review process merely highlight the interconnection of this case

with *Boumediene* and *Al Odah*, Pet. 16-19, and Congress surely did not intend that the review of CSRT determinations would exceed any known judicial or administrative parallel.

Contrary to respondents' argument (Br. in Opp. 17), the text of the DTA does not resolve this issue. Nothing in the DTA defines the record on review. See, *e.g.*, Pet. App. 90a-91a (Randolph, J., dissenting from denial of rehearing en banc). Indeed, to the extent that the text of the DTA speaks to the issue, it suggests that the record is comprised of only the material presented to the CSRTs, because Congress authorized the court of appeals to review whether the CSRT decision "was consistent with the standards and procedures specified by the Secretary of Defense," DTA § 1005(e)(2)(C), 119 Stat. 2742, and those standards and procedures explicitly define the "record" as consisting of evidence actually presented to and considered by the CSRTs. Pet. App. 140a-141a; see Pet. 21-23. The extensive legislative history, moreover, documents Congress's intent to streamline judicial review for Guantanamo Bay detainees in a manner that is fundamentally incompatible with the unprecedented breadth of the record on review conceived by respondents. See Pet. 23-24.

2. The court of appeals may perform its authorized review functions under the DTA without expanding the record on review beyond the material considered by the CSRTs. For example, CSRT procedures require the recorder to present to the CSRT any relevant, exculpatory evidence. Pet. App. 138a, 144a. As the criminal context amply demonstrates, courts are able to ensure that exculpatory evidence has been produced without requiring the government to lay bare its files. Pet. 25-26. Indeed, counsel in this case claim to have exculpatory material

that was improperly excluded from CSRT proceedings, Br. in Opp. 1, 3-6, 9-11, and they may present that evidence to the court of appeals for its consideration, see Pet. 27.[2]

Respondents similarly claim to have other evidence that CSRT procedures have not been followed, Br. in Opp. 8-12, 23, 30, which they obtained without requiring the government to construct a hypothetical record on review. They can present those materials to the court of appeals through DTA review as well. Further, an expanded record is not required to judge whether a preponderance of the evidence supports a detainee's designation as an enemy combatant, because it is well settled that the "preponderance of the evidence" standard refers to the evidence presented to the tribunal, not to some other set of information that could have been presented. Pet. 26-27.

The recent briefing in the *Parhat* case demonstrates that a detainee, represented by counsel with access to the classified CSRT record, can raise numerous potentially dispositive challenges to his detention as an enemy combatant. For instance, Parhat has challenged whether an individual who is not a member of al Qaida or the Taliban, and who purportedly did not intend to support those groups, can nevertheless be detained as an enemy combatant; whether an individual who himself does not directly engage in hostilities against the United States can be detained; whether the President's powers under Article II of the Constitution provide an independent basis for his detention; and whether appropriate relief

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[2] Respondents have another alternative as well, which is to utilize Department of Defense procedures regarding "new evidence," which expressly authorize CSRTs to consider material, exculpatory evidence that was not presented to the original CSRTs. See Pet. App. 177a-181a.

under the DTA would be remand or release. Pet. Br. at 12-28, *Parhat*, *supra*. In addition to the *Parhat* case, the court of appeals has also set briefing schedules in four other cases brought by respondents. Meaningful judicial review is therefore available on the classified CSRT records.

3. Respondents devote much of their brief (Br. in Opp. 3-6, 8-12) to protestations of innocence and distortion of the facts regarding the CSRT process provided. Word limitations prevent a full response to those misstatements. But two matters deserve mention here.

First, respondents' claims (Br. in Opp. 3-6) that they and the other detainees are innocent civilians are without basis. For example, in the recent merits briefing in *Parhat*, the government has explained that Parhat underwent military training at an al Qaeda and Taliban sponsored military training camp before he was captured by coalition forces. The classified brief (which will be made available to this Court upon request) details facts about the camp and persons trained there and about the organization of which Parhat was a member. See Classified Gov't Br. (corrected) at 5-7, 9-10, 18-24, *Parhat*, *supra*; Classified App. at 20-21, 24, 36-37, 42-44, 49-52, 74, 82-83, 86, 100, *Parhat*, *supra*. The unclassified CSRT record likewise shows that Bismullah was a member of the Taliban; received AK-47s, vehicles, and communications devices from that group; was affiliated with Fidayan Islam, a terrorist group that targeted U.S. and coalition forces; and was directed by that group to identify and kill those Afghanis who supported U.S. forces. See Unclassified CSRT Record, encl. (1) at 1, encl. (3) at 5-6, *Bismullah* v. *Gates*, No. 06-1197 (D.C. Cir.).

Second, respondents are mistaken in contending that the government did not comply with CSRT procedures.

Contrary to respondents' suggestion (Br. in Opp. 11), recorders did not routinely withhold relevant exculpatory information from the CSRTs. Admiral McGarrah unequivocally stated just the opposite, explaining that all identified exculpatory information was always presented to the CSRTs, unless that material was merely duplicative or was not relevant to an asserted basis of a detainee's enemy combatant status. Pet. App. 236a. Respondents are also mistaken in contending (Br. in Opp. 9-10, 32 n.23) that identification and review of the Government Information was delegated to private contractors whose access to classified information was limited to portions of two databases. As the cited sources make clear, that role was performed by Defense Department personnel, including reservists. See, *e.g.*, Resp. Stay Opp. App. 291 ¶ 5. Only two contract analysts were used for a short period to perform limited tasks in assisting the recorder team. In addition, Admiral McGarrah explained that although Defense Department personnel initially turned to the two databases that were expected to contain the vast majority of relevant information, searches were not limited to the information contained in those databases. Pet. App. 230a-232a.

In all events, these matters can be addressed more fully in the D.C. Circuit even if the Court holds this petition. The bottom line remains that the orderly manner of proceeding is for the Court to hold or grant and expedite this petition.

C. The Requested Relief Is Modest And Entirely Warranted

1. The government's petition asks this Court in the first instance simply to hold this case pending the disposition of *Boumediene* and *Al Odah*, which is expected within the next few months. Once that decision issues,

this case may be dispensed of by the Court in an expedited fashion. And if the Court believes that further action is warranted at this juncture, the government has proposed expedited briefing and oral argument (which respondents have agreed to).

By contrast, as the government has explained (Pet. 28-32), if this Court denies this petition, the decision below will immediately put the government to the dilemma of either engaging in a practically infeasible attempt to recreate the information the recorder might have reviewed, or conducting mass remands of DTA cases for an additional round of CSRT proceedings in the midst of an ongoing armed conflict.[3] Recreating the historic record sought by the court of appeals may not even be possible, and the effort to do so would create a substantial diversion of valuable and limited intelligence, military and law enforcement resources. See Pet. 29-31; Pet. App. 182a-214a. The court of appeals explicitly acknowledged the dilemma it posed to the government, Pet. App. 62a-63a, and several judges noted the serious burdens and risks either option would entail, *id.* at 88a-89a (Henderson, J., dissenting from denial of rehearing en banc); *id.* at 95a-96a (Randolph, J., dissenting from denial of hearing en banc).

Respondents urge this Court to disregard the sworn testimony of the Nation's top intelligence officials on the burdens and national security risks created by the decision below. See Br. in Opp. 26-27, 30-31. But respondents ignore the massive undertaking that would be required to attempt to collect and review the classified information that the government would be required to

[3] Contrary to respondents' contention (Br. in Opp. 36 n.25), the latter option would not entail the same reconstruction of the "record" as the former option. See U.S. Stay Reply 10 n.3.

produce under the decision below. Pet. 29-30. Further, in some cases, disclosure of the material to anyone, even to the court, would violate agreements with foreign intelligence sources and would harm the government's ability to obtain information from such sources in the future. Pet. 30-31; Pet. App. 186a.[4] And the court of appeals correctly rejected respondents' suggestion (Br. in Opp. 28) that the government is to blame for these burdens and risks, explaining that the government had no reason to create the expanded "records" at the time of the original CSRTs. Pet. App. 62a.

The government will ultimately shoulder whatever burdens it must to provide constitutionally sufficient or statutorily-compelled judicial review for these detainees. But it makes no sense to put the government to this dilemma now, while the constitutional adequacy of DTA review remains sub judice. This Court's resolution of *Boumediene* and *Al Odah* may require additional steps to ensure that DTA review complies with the Constitution or may essentially moot the question here altogether. However those cases are resolved and whatever the ultimate contours of constitutionally-adequate DTA review, a hold or grant of this petition is appropriate.

2. This Court's consideration of this petition is warranted now, because the government will be unable to obtain meaningful relief at a later point in these proceedings. This case is ripe for review in all pertinent respects: The court of appeals has definitively ruled on

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[4] Respondents argue (Br. in Opp. 27, 29-30) that the fact that the government has shared classified factual returns with counsel in the habeas cases indicates that the government's national security concerns are unfounded. Those factual returns, however, are the same as the classified CSRT records that the government has already provided to counsel and agreed are the relevant basis for judicial review.

a question of law that is of fundamental importance in determining the nature and scope of DTA review, and if the government is not able to obtain review at this juncture, it will be denied any meaningful review at all. Indeed, respondents make no attempt to explain how, if certiorari were denied, the government would be able to obtain any meaningful review at a later date.

Contrary to respondents' suggestion (Br. in Opp. 15), the procedural posture of this case presents no impediment to this Court's review. It is well-established that certiorari review is available for interlocutory judgments, particularly where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case" and the decision below "will have immediate consequences for the petitioner." Robert L. Stern et al., *Supreme Court Practice* 259 (8th ed. 2002) (citing cases). Here, the question of the content of the record on review is an important threshold matter for DTA review, see Pet. 16-19; that question was throughly considered by the court below, see Pet. App. 1a-102a; and the court of appeals' resolution of that question will have serious consequences for the government and for national security, see Pet. 28-32. It is thus difficult to imagine a more compelling situation for interlocutory review.

* * * * *

For the foregoing reasons, and the reasons set forth in the petition, the petition should be held pending this Court's decision in *Boumediene* v. *Bush* and *Al Odah* v. *United States*, and disposed of as appropriate in light of that decision. In the alternative, the petition should be granted and this case should be set for expedited brief-

ing and oral argument on the schedule proposed by the government, so that the case may be decided this Term.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

MARCH 2008